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REPORTS OF CASES ^{c#}

ARGUED AND DETERMINED

IN THE

^{New York (State)}
= COURT OF APPEALS

OF THE

30

STATE OF NEW YORK,

WITH

NOTES, REFERENCES, AND AN INDEX.

BY JOEL TIFFANY,

COUNSELOR AT LAW.

VOL. III.

ALBANY:

WEARE C. LITTLE, LAW BOOKSELLER,
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1866.

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JUDGES OF THE COURT OF APPEALS.

HIRAM DENIO, CHIEF JUDGE.

HENRY E. DAVIES,
WILLIAM B. WRIGHT, } JUDGES.

HENRY R. SELDEN,

DANIEL P. INGRAHAM,

HENRY HOGEBROOM,

JOSEPH MULLIN,

THOMAS A. JOHNSON.

} Justices of the Supreme Court, and
ex officio Judges of the Court of
Appeals from January 1, 1864, to
January 1, 1865.

AN ACT IN RELATION TO THE JUDICIARY.

[*Laws of 1847, Ch. 280.*]

"§ 5. The judge of the Court of Appeals elected by the electors of the State, who shall have the shortest time to serve, shall be the Chief Judge of said Court.

"§ 6. Four justices of the Supreme Court, to be judges of the Court of Appeals, shall every year be selected from the class of said justices having the shortest time to serve; and alternately, first, from the first, third, fifth and seventh judicial districts, and then from the second, fourth, sixth and eighth judicial districts; and shall enter upon their duties as judges of the Court of Appeals on the first day of January, and serve as judges of said court one year."



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C A S E S
DETERMINED IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

At the January Term, A. D. 1864.

WILLIAM ROOT *v.* GEORGE WAGNER, Sheriff, &c.

The party in whose favor process issues, may give such directions to the sheriff as will not only excuse him from his general duty, but bind him to the performance of what is required of him.

Where a judgment is recovered against several defendants, and execution issued against all, the plaintiff in the judgment, or the assignee thereof, may direct the amount thereof, or any thing less than the whole amount, to be made out of the property of any or either of the defendants.

Where a judgment was recovered against four defendants, C., K., S. and T., and an execution issued thereon was levied upon the property of C., K. and S., whereupon the holder of the judgment directed the sheriff to let the sale of K.'s property, which was advertised for sale, go down, but to hold on to the levy as to the property of C. and S., and to make two-thirds of the judgment out of the property so levied on, of C. and S., which order and direction the sheriff refused to obey: *Held*, that the sheriff was liable to the holder of the judgment for two-thirds of the amount thereof, upon the assumption that the property of C. and S., which he had levied on, was sufficient to make that amount.

Appeal from a judgment of the Supreme Court, entered upon the report of a referee.

THE action was prosecuted to recover from the defendant, as sheriff of Yates county, the balance due upon a

Statement of case.

judgment owned by the plaintiff, upon which execution had been issued and delivered to the defendant as sheriff. The facts found by the referee, before whom the cause was tried, are as follows: That a judgment was obtained in the supreme court in favor of the Bank of Genesee, against Alva Clarke, Joseph Ketchum, Theodore F. Sharpe and Nelson Thompson, defendants, for the sum of \$924.23, and that the same was docketed in the clerk's office of Yates county on the 30th of August, 1850. That an execution was issued on said judgment, and received by the defendant as such sheriff, on the 31st day of August, 1850. That the defendant, as such sheriff, pursuant to and by virtue of said execution, levied upon personal property of the defendants in the execution (except that of Nelson Thompson), in the life-time of the execution, to an amount of between two and three thousand dollars, viz: On a store of goods of said Sharpe valued at \$2,000; a span of horses of Clarke valued at from \$250 to \$400, and upon live stock and farm property of said Ketchum valued at \$1,000. That on the 30th of November, 1850, and after said levy, the said judgment was sold and assigned to the plaintiff in this action, for a valuable consideration, of which sale and assignment the sheriff had notice. That the said sale and assignment were made to the plaintiff in good faith, for a valuable consideration by him paid, and that he thereby became and is the lawful owner of said judgment. That after such assignment the plaintiff in this action directed the sheriff to let the sale of Ketchum's property, advertised to be sold on the day after the said assignment was made, go down, but to hold on to the levy and all the levy by him made, on the property of other defendants, until further directions. That the property of said Ketchum, so advertised to be sold, was of sufficient value to make the amount of such execution. That after such assignment and notice to the sheriff, the plaintiff in this action ordered and directed the defendant, as sheriff, to make two-thirds of said

Statement of case.

judgment out of the property so levied on by him, of the said Clarke and Sharpe, which order and direction the defendant, as such sheriff, neglected and refused to comply with and obey. That this action was commenced on the 24th day of June, 1851, and that two-thirds of the original judgment, on the 9th of July, 1857, amounted to the sum of \$912.20, and the referee found as a conclusion of law that the plaintiff was entitled to recover the said two-thirds of the amount of the original judgment so assigned to him, with interest thereon from the time of docketing said judgment. The judgment upon the report of the referee was affirmed at general term, and the defendant appealed.

F. Kernan, for the appellant.

I. The recovery is not for any act or omission of the defendant occurring prior to the 30th of November, 1850. The alleged cause of action upon which the recovery was had, is that the sheriff did not, in obedience to instructions given to him after that day by the plaintiff who had purchased the judgment, make two-thirds of the amount of the execution from the property of Clarke and Sharpe, two of the four judgment debtors.

II. Upon the facts of the case, the defendant is not liable for two-thirds of the judgment, and the referee erred in deciding that he was.

1. The judgment was against the four defendants for damages and costs, and there was no allegation or proof as to whether it was upon contract or for a *tort*; or whether, as between the defendants themselves, either had superior equities, as against the others, as to its payment. (2 Barb. Ch. R. 462, per Chancellor; 2 J. Ch. R. 131; 11 Paige, 19.)

2. The execution was in the usual form. There was no notice or special direction to the sheriff as to executing the writ, until after the 30th of November, 1850. In advertising and proceeding to make the amount of the execution

Argument for Appellant.

from the property of Ketchum, one of the defendants, on the 30th of November, the defendant was acting according to law. He omitted to collect the amount of the execution on that day by the express direction of the plaintiff herein.

3. Under these circumstances, the defendant was not required to make two-thirds of the amount of the execution from the property of Clarke and Sharpe, and is not liable to the plaintiff for omitting to do so.

(a.) The sheriff is a minister of the law, not the agent of the party. So long as he executes process according to the law, he cannot be made liable to the party, in an action on the case, for refusing to follow his instructions as to the manner of executing it. He may collect an execution in thirty days, but he is not liable to the party if, in disregard of his instructions, he give the debtor sixty days to pay it. He may, in defiance of the directions of the party, adjourn a sale of property, to try to obtain a better price. It is submitted, therefore, that if the plaintiff in the execution had, on issuing it, directed the sheriff to make two-thirds of the amount from the property of Clarke and Sharpe, he was not bound to do so, but might have levied it from the property of Ketchum.

(b.) But in this case no special directions were given to the sheriff until the time to levy by virtue of the execution had expired, and until, relying on the property of Ketchum as sufficient to satisfy the demand, he had allowed the property of Clarke and Sharpe to pass from his control, as he had a right to do. Again: at the time of these instructions, the sheriff had, in good faith and rightfully, advertised and was about to sell property of Ketchum sufficient to satisfy the debt. The plaintiff could not then compel him to look up other property and sell it, to pay two-thirds of the debt, or make him liable for that amount for his refusal to do so.

(c.) Again: it is not proved or found that the sheriff could have made two-thirds of the execution from the pro-

Argument for Appellant.

perty of Clarke and Sharpe, at the time he was directed to do so, if he had made the effort. This, at least, should have been found, to warrant the judgment. The contrary is quite evident.

(d.) Again: There is nothing in the case showing why two-thirds should be made from Clarke and Sharpe. The judgment was against four. It does not appear that Thompson had not property. It does appear that the property of Clarke which was levied upon would not make one-third.

(e.) It was not proved, and is not found, that the property of Clarke and Sharpe, respectively, was sufficient to pay one-third of the amount. The instructions and judgment are on the theory that the sheriff was bound to make two-thirds from their several property, even if it had to be levied from the property of one of them.

4. It is submitted that the judgment is unwarranted by the facts established.

III. At common law an action on the case would not lie against a sheriff for neglecting to execute a *fi. fa.* according to its demand or return it in due season. Much less could an action like this be sustained. (*Moreland v. Leigh*, 1 Stark. R. 388; *Watson on Sheriffs*, 203; *Commonwealth v. McCoy*, 8 Watts, 151; *Pardee v. Robertson*, 6 Hill, 550-552.)

IV. The statute which gives to an aggrieved party an action for damages against sheriffs and other officers neglecting to execute process, provides for only two classes of cases, viz: 1. When the officer does not execute the process according to the command thereof; and, 2. When he neglects to make due return of his proceeding thereon. In no other cases can the action be maintained by virtue of the statute. (2 R. S. 440, § 77, 1st ed.)

V. It cannot be claimed that this action or recovery is founded on the sheriff's neglect to execute the process according to the command thereof, or to make a return.

Argument for Respondent.

1. There is no allegation of such neglect in the complaint; and the recovery was not claimed or had upon this ground.

2. But the sheriff was in good faith proceeding to execute the writ according to the command thereof, and would have collected the money and made due return but for the direction of the plaintiff to desist from selling the property advertised, and not in any event to sell the property of Ketchum. This would be an answer to an action for not making a return.

VI. But, if technically liable, the damages should have been only nominal. The facts do not authorize a judgment for two-thirds of the judgment. On these facts it would be monstrous to hold the defendant liable for this large sum. If bound to pay it, he has no remedy, and the real debtors escape.

D. B. Prosser, for the respondent.

I. The only questions which are properly before the court on this appeal are the objections and exceptions taken by the defendants to the reception of evidence on the hearing, and these were the only exceptions in the case upon which the general term gave judgment. The exceptions to the report of the referee, as presented by the case, made and filed since the decision and judgment of the general term, have not been passed upon by that court. This court is strictly a court of review, to correct errors in the actual determination of the general term of the supreme court. The special term had no power or authority to correct the record of the general term, or grant the order allowing the case and exceptions, after the judgment of the general term. The general term, if it had been applied to, could only have corrected the case after judgment, so as to properly present the facts and exceptions actually taken and imperfectly stated, which had been passed upon by it. The general term could not authorize the making a

Argument for Respondent.

new case, after judgment, containing exceptions not before taken. (*Johnson v. Whitlock*, 3 Kernan, 350.) Here we have now two cases; the one upon which the judgment of the general term was given, and the other for this court to pass upon.

II. There was no error in the referee's over-ruling the objection on the part of the defendant to the reading of the assignment of the judgment in evidence, because:

1. The execution and delivery thereof was distinctly alleged in the complaint, and was not denied by the answer.

2. The proof was that the assignment was executed and delivered to the witness by the president, in the bank, at the time of the payment of the moneys. No other evidence of its execution was necessary.

3. The judgment being for less than \$1,000, no resolution of the directors was necessary to authorize a sale and assignment thereof, by the president. (1 R. S. 598, § 8.)

4. The authority of the president, (if any should be deemed necessary,) to execute the assignment, will be presumed, until the contrary is made to appear. (*Bank of Vergennes v. Warren & Storrs*, 7 Hill, 91; *Gillett, rec. v. Campbell*, 1 Denio, 520.)

III. In case the court should be against us on the propositions contained in the first point, and should deem the exceptions to the report of the referee, as contained in the case made and filed since the decision and judgment of the general term, as properly here on this appeal, it is still submitted that the conclusions of the referee were fully justified under the pleadings and evidence, and that the exception to his report is not well taken, because it is well settled by the authorities that a plaintiff, or owner of a judgment and execution, has a right to instruct the sheriff as to the manner of executing the process, which instructions the sheriff is bound to obey, so long as they are within his general power and duties. (*Walters v. Sykes*,

Argument for Respondent.

22 Wend. 566; *Godfrey v. Gibbons*, id. 569; *Sherry v. Schuyler*, 2 Hill, 204; *Armstrong v. Garrow*, 6 Cowen, 465; *Gorham v. Gale*, 7 id. 739; Allen on Sheriffs, 143-4.) Therefore it seems to follow that when such instructions are given and the sheriff refuses to obey, a right of action for such refusal arises. Were it otherwise, the authority and right to instruct, and the duty to obey, would be of no avail, as the law would afford the injured party no mode of enforcing obedience, or indemnity for damages suffered by reason of the disobedience. In the case now before the court, we have not only the neglect of the defendant to obey the lawful instructions of the plaintiff, but that he willfully refused to proceed in the collection of the execution as directed by the plaintiff, or to collect the same in any way unless he was permitted to go contrary to the instructions of the plaintiff. The defendant ought not to complain if he should be held to a strict accountability. His refusal was willful, from which the inference would seem to be warranted that he was in some way indemnified by the defendants in the execution, for whom he seemed to be acting. He was willing to obey the instruction of the plaintiff so far as such instruction related to the property of Ketchum, but when called upon to proceed against the property of the other defendants levied upon, he utterly refused, thus undertaking to protect two of the defendants in the execution at the expense of one of the others. It is time the defendant, and all others holding like executive trusts, learned that it is no part of their duty to assume the province of a court of equity, by undertaking to adjust what they may regard to be equities of the case between the parties; and that it is their duty to obey the process, and the lawful instructions of the party having a right to instruct. The plaintiff is remediless unless he can maintain his action. The defendant holds the execution, with a levy upon sufficient property to satisfy the same, but absolutely refuses to proceed

Opinion of DAVIES, J.

unless he can do so in a particular manner, contrary to the instructions of the plaintiff. Not only so, but before this action was commenced he received \$294 of Clarke upon the execution, which he still holds.

DAVIES, J. The sheriff has refused to obey the directions of the plaintiff, in reference to the execution in his hands, and has defended this action upon the theory that he was under no obligations to conform his action to such directions. In this he is clearly in error. The party in whose favor process issues, may give such instructions to the sheriff as will not only excuse him from his general duty, but bind him. Both the process and the law which convey authority under it, are for the benefit of the party in whose behalf it is issued, and it is a general rule that a man may dispense with an entire law which is intended for his aid or protection. It follows that he may qualify it, to a greater or less extent, according to his discretion. (*Walters v. Sykes*, 22 Wend. 566.) In the present case this plaintiff, as soon as he became the owner of the judgment, became the real plaintiff therein, and in the execution issued to enforce the collection thereof. Both thereafter were to be employed for his benefit, and were under his control, and those charged with the execution of the process thereon were as much subject to his directions as if he had been the original plaintiff in the judgment. Almost the precise point arising here was presented in the case of *Godfrey v. Gibbons* (22 Wend. 569). The plaintiff in that case had a judgment against two persons by the name of Gibbons, and one Wiswall. He issued an execution thereon, directing the sheriff to levy the money of the defendants Gibbons; but the sheriff, acting under their advice, made a levy on the property of the defendant Wiswall only. The plaintiff then withdrew the first execution, and issued another, which was levied upon the property of the defendants Gibbons, according to the directions of the

Opinion of DAVIES, J.

plaintiff. It was shown by affidavits that, as between the Gibbonses and the other defendants, those defendants ought to pay the debt. This depended on the state of the accounts between the defendants. The defendants Gibbons moved to set aside the last execution, and took the ground that the levy on the property of the defendant Wiswall, under the first execution, and which the plaintiff had released by its countermand, had satisfied the judgment. The supreme court denied the motion, and said they had nothing to do with the state of the accounts between the defendants. The plaintiff, not the defendants, or any of them, had a perfect right to direct a levy on the joint or several property of the defendants, or any of them, the judgment being against all. That the plaintiff was at liberty to disregard the levy made upon the property of Wiswall, for the sheriff was bound by the directions of the plaintiff's attorney to levy on the property of the Gibbonses only. Referring to the case of *Walters v. Sykes* (*supra*), the court said the sheriff might, by the direction of the plaintiff's attorney, as a special agent, be restrained and limited to any act which is within his general authority under the writ. We therefore see that the execution is issued for the benefit of the plaintiff therein, or the owner thereof; that it is the duty of the sheriff to conform to his directions, in the execution of the process when within his general authority under the writ. That the plaintiff may direct the amount of the execution to be made from the joint or several property of the defendants therein, and in the judgment, or that of any of them. It follows that the judgment in this case, being against four defendants, and the execution therein against the four, it was competent for this plaintiff to direct the amount thereof to be levied on the property of any of them. That as he could direct the whole to be made out of the property of any of the defendants, it also follows that he could direct less than the whole to be made in like manner. Upon the defendant's theory,

Opinion of DAVIES, J.

Ketchum could have been compelled to pay the whole judgment. Undoubtedly the plaintiff could have collected the whole judgment from his property. Upon the same principle, and for the same reason, the whole of the judgment could have been collected from the property of the defendants Clarke and Sharpe. If the whole could have been collected from them, it is difficult to see why two-thirds may not be. It was, therefore, clearly the duty of the sheriff to conform his action to the directions of the plaintiff, and collect the two-third part of the judgment out of and from the property of the defendants, Clarke and Sharpe, levied on by him; and as the referee has not found that such property was inadequate to make such amount, we must assume it was sufficient for that purpose. The plaintiff was, therefore, damnified to the extent of two-thirds of the amount of his judgment, by reason of the refusal of the defendant to comply with his directions, and the referee properly gave judgment for that amount.

The judgment should be affirmed.

MULLIN, J., was for a reversal. All the other judges being for affirmance, judgment affirmed.

Statement of case.

RICHARD G. FOWLES v. HENRY C. BOWEN.

In an action for slander, the plaintiff, to show special damage, may give in evidence the contents of a letter written by the person to whom the slander was uttered, to his partner, advising him to discharge the plaintiff from their employ and stating the substance of the writer's conversation with the defendant, although the letter did not cause the discharge of the plaintiff, but only an examination of his trunks.

In an action for slander, a previous letter written by a partner of the defendant, and with his assent, concerning the plaintiff, is admissible in evidence to show malice.

Words spoken of the plaintiff, while in the employ of the defendant's firm as a clerk, and addressed to a subsequent employer, to the effect that the plaintiff had become such a notorious liar that they could place little or no confidence in him; that they were so strongly impressed with his dishonesty that they had written to a person named to employ a police force to watch him, &c., must be understood as relating to him in his capacity as clerk; and being spoken of him in connection with his business, they are actionable *per se*.

Any charge of dishonesty, against an individual, in connection with his business, whereby his character in such business may be injuriously affected, is actionable.

After a mercantile firm has given to one of its clerks a general recommendation as such, if a partner is led by facts subsequently coming to his knowledge, to change his opinion, it is his right and duty to communicate the facts to a subsequent employer of the clerk, in order to guard him against being misled by the previous recommendation of the firm.

Such a communication, if true, is privileged; and in order to sustain an action thereon for slander, the plaintiff must show it to have been malicious.

In the case of privileged communications, slight evidence of malice may be left to the jury.

Evidence of the falsity of the charge is not sufficient to authorize the inference of malice.

The plaintiff, if he seeks to maintain his action, must show that the charge was false, before he can ask the jury to find the slander to be malicious.

Appeal from a judgment of the Superior Court of the city of New York, in an action for slander.

THE defendant was one of the firm of Bowen & McNamee, of New York. The plaintiff had been a clerk in their

Opinion of INGRAHAM, J.

employ. On his leaving them, the firm gave him a letter of recommendation, saying that he had attended to his duties in a satisfactory manner. A few days after, a letter was written to a Mr. Shiletto, of Cincinnati, telling him that since Fowler left them they had heard of his taking several trunks with him, larger than required for his clothing, and requesting him to have some officer to watch him and examine his baggage. In February succeeding, Cole, with whom the plaintiff was employed at Cincinnati, visited New York, and there the conversation took place which is the subject of this action. Bowen stated to Cole, in his store, that he desired to set him right in regard to a young man in their employ, viz: Fowler; that he had become such a notorious liar that he could place little or no confidence in him; that he had strong cause to doubt his honesty, and had written to Mr. Shiletto to employ an officer to watch him. The letter to Shiletto was written by Stone, one of the firm, with the knowledge of Bowen.

The defendant, in his answer, claimed that the words were a privileged communication. No special damage was shown. The judge submitted to the jury whether, if the communication was privileged, it was made maliciously; and if so, added that the plaintiff was entitled to damages. The answer also contained an averment of the truth of the words complained of, and the judge instructed the jury that if the defendant failed to prove the truth of the words it was an aggravation of the wrong.

The jury found for the plaintiff for \$4,500 damages, and the judgment entered thereon was affirmed by the general term, and the defendant appealed to this court.

Jno. K. Porter, for the appellant.

Charles O'Connor, for the respondent.

INGRAHAM, J. Upon the trial of this cause, the plaintiff, to show special damage, was permitted to give in evidence

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the contents of a letter written by Cole to his partner, advising him to discharge the plaintiff from their employ, and stating the substance of his conversation with the defendant; that, in consequence of the receipt of that letter, Cole's partner stated its contents to the plaintiff, and went with him to his rooms and examined his trunks, but that he did not discharge him in consequence of that letter. To this evidence the defendant objected. I do not see any good cause for the objection to this evidence. It was a communication from one partner to another, in regard to a matter connected with the interests of the firm, and the natural result of the communication made by the defendant to Cole. As is said in *Terwilliger v. Wands* (17 N. Y. R. 54), occasions may doubtless occur where the communication of slanderous words by a person who heard them will be innocent; and it is certainly reasonable that when repeated on such an occasion and damages result, the first speaker should be held responsible for the damages as flowing directly and naturally from his wrong. The communication from Cole to his partner was necessary, and the result of the defendant's communication. There can be no doubt, if the instructions of Cole had been followed and the plaintiff discharged, the act would have been the immediate and natural result from the speaking of the words by the defendant, and, as such, admissible in evidence.

The repetition of the slander to a third person without any interest existing to call for the communication, is not admissible; but when the slander is repeated to be connected with instructions injurious to the plaintiff, and necessarily connected with the business or interests of the man to whom the slander was spoken, it may be used for the purpose of showing damage. (*Olmstead v. Brown*, 12 Barb. 657.)

The letter of Stone was received in evidence and objected to by the defendant. This letter was written by a partner of the defendant, and there was evidence to show that it

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was written with his assent; and the defendant himself told Cole "we have written to Shiletto to employ a police force to watch him." Any other letter written by the defendant would, under various decisions, be admissible to show malice, although the propriety of that rule has been doubted. (7 John. R. 270; 2 Saunders' Pl. and Ev. 808; *Inman v. Foster*, 8 Wend. 609; *Kennedy v. Gifford*, 19 Wend. 298.)

If the letter of Cole to Hopkins was admissible, as a necessary consequence of the words spoken by the defendant and connected with Cole's interest, what Hopkins did in connection with or in pursuance of that letter would be admissible evidence. What Cole did affecting the plaintiff in consequence of the defendant's communication to him would be evidence to show damage, and the same things done by his partner, under instructions from him, are subject to the same rule. The ground upon which this was received was, that it tended to show the special damage. Whether or not it made out such damage was a question for the jury or the court after the evidence was received. The failure to do so, and the subsequent direction to the jury to disregard that evidence, cannot have any effect on its admission originally.

It is objected that the words were not *per se* actionable, and, as no special damage was proved, the complaint should have been dismissed. The words were spoken of the plaintiff while in the employ of the defendant, and the charge was that he had become such a notorious liar that they could place little or no confidence in him. That they were so strongly impressed with his dishonesty, that they had written, &c., to employ a police force to watch him. It must be obvious to any one that such words, addressed to an employer in respect to his clerk, must be understood as relating to him in his capacity as clerk. The idea that a man may speak to a merchant about the dishonesty of one employed by him, and be able to separate the charge of

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dishonesty from his acts as clerk and place them upon the individual only in his private relations, is delusive. Nothing else could be understood from those words than that the defendant had reason to doubt his honesty while with him; and the preface to the communication showed the intent of the defendant to apply the words to the plaintiff in his capacity as clerk, when he said he desired to set Cole right in regard to a young man in his employ named Fowles. Such words, spoken of a person in connection with his business, are actionable.

Any charge of dishonesty, against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. If spoken of him individually, and not in connection with his office or business, these words would not be actionable. (*Van Tassel v. Capron*, 1 Denio, 250.)

The rule is given by JEWETT, J., in *Kinney v. Nash* (3 Comst. 177): "The principle is well settled that to maintain an action for words spoken, the words must either have produced a temporal loss to the plaintiff, &c., or they must impute some matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment." If there was any question, on the evidence, whether the words were spoken of the defendant in relation to his trade or business, then the decision of it belonged to the jury. The judge on the trial so left it to the jury, and to his instructions as to the law the defendant did not object, except to the submission of any question on that point to them; and that has not been argued here.

But the defendant objects that this communication was privileged; and that without evidence of express malice the court should not have submitted the case to the jury to say whether there was any malice on the part of the defendant. There can be little, if any, doubt that the communication was privileged. The defendant and his

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partners had given the plaintiff a recommendation as clerk. That recommendation was in the form of a general letter addressed to no one, and if untrue would have exposed the writers to an action by any one injured thereby. After this was given, the defendant was led, by facts coming to his knowledge, to more inquiry, and on Mr. Cole's visit to this city, while the plaintiff was in his employ, the defendant made to him the communication which forms the subject of this action. There can be no doubt of his right and duty to make such a communication if it was true, and was made to guard Cole against being misled by the letter written by the defendant's firm; and in order to sustain a verdict thereon, the plaintiff must show the communication to have been malicious. There is no proof of express malice. On the contrary, in all the communications of the defendant a desire is expressed to avoid publicity and not unnecessarily injure the plaintiff. The judge, however, submitted to the jury the question whether the communication was made in bad faith, without believing at the time it was made that it was true.

In the case of privileged communications slight evidence of malice may be left to the jury. (*Kelly v. Partington*, 24 Eng. Com. L. Rep. 144; 4 B. & Ad. 700.) In the case of *Hastings v. Lusk* (22 Wend. 410), malice appears to have been inferred from the want of pertinency of the slanderous words, at the time they were spoken, while the occasion made them privileged, and the question of malice was left to the jury. In that case the chancellor says: "The presumption that there was no malice is not rebutted by the plaintiff merely showing that the charge against him was untrue in point of fact; it must be further shown that the defendant either knew or had reason to believe it was untrue, at the time of the speaking of the words complained of.

In the present case there is no direct proof of malice. The only testimony from which malice could be inferred is the falsity of the charge; but this is not sufficient. (*Harris*

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v. *Thompson*, 24 Eng. L. & Eq. Rep. 370.) JERVIS, C. J., says: "It must be something consistent only with a desire to injure the plaintiff to justify a judge in leaving the question of malice to the jury." And WILLIAMS, J., says: "The mere circumstance of the statement being false, will not suffice to show malice, unless there is some evidence to show that the defendant knew it to be false." At any rate, the want of proof on the part of the defendant, that the slander was true, is not enough; and the plaintiff, if he seeks to maintain his action, must show that the charge was false, before he can ask the jury to find the slander to be malicious.

SELDEN, J. says in *Lewis & Herrick v. Chapman* (16 N. Y. 369), in speaking of privileged communications: "the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence." And the charge of the judge that the law would infer malice from the falsity of the words, was held to be erroneous. (See also *Child v. Affleck*, 17 Eng. Com. Law, 186; *Somerville v. Hawkins*, 70 Eng. Com. Law, 583; *Vanderzee v. McGregor*, 12 Wend. 546.)

The only evidence in this case relied on to prove malice, as stated by the judge in his charge, was the original letter given when the plaintiff was leaving the defendant's employ, and the conversation with Carter, about the same time. That evidence would hardly be enough to warrant the finding that the words were false, and under the cases cited I think not enough to submit the question of malice to the jury. The judgment should be reversed, and a new trial ordered.

DAVIES, J., did not sit in the case. All the other judges concurring, judgment reversed.

Statement of case.

GARRET LEFEVER v. NATHAN LEFEVER.

The plaintiff, a director in a bank, who had been such from its organization, who usually attended the meetings, and was actually present and took part in the proceedings of the board of directors when the last dividend was declared, having purchased from the cashier of the institution twenty shares of the capital stock, brought an action to have such contract rescinded, and to recover back the money paid, on the ground of false representations and concealments of the cashier, as to the value of the stock and the condition of the bank, at the time of the purchase: *Held*, that the plaintiff was not estopped from setting up his actual ignorance of the condition of the bank at the time of the sale.

That although the purchaser was a director of the bank, having the means of knowledge, he was not in the particular transaction chargeable with notice of the condition of the bank.

That if he was *actually ignorant* of its condition, the fraudulent vendor would be equally responsible to him for the deceit as to any stranger to the institution.

That it was not a case in which the plaintiff was legally bound to know the truth or falsity of the vendor's representations.

Held, also, that the evidence in such action plainly showing that at the time of the alleged sale and transfer of the stock, on the 29th of August, 1857, the bank was, by the application of all the *ordinary* tests, sound, solvent and prosperous, and the stock worth all that the defendant had represented it to be, the plaintiff could not be allowed to show the contrary by introducing in evidence what purported to be a certified copy of proceedings had in November, 1857, on the petition of certain stockholders, for the re-establishment of the bank.

THIS action was of a novel character. A director of a bank (who had been such from its organization, who usually attended the meetings and was actually present and took part in the proceedings of the board of directors when the last dividend was declared), having purchased from the cashier of the institution twenty shares of its capital stock, asked to rescind such contract and recover back the money paid, on the ground of false representations and concealments of the cashier as to the value of the stock and the condition of the bank at the time of the purchase. The

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cause being tried by a referee, he found that at the time of negotiating the sale and transfer of the stock (viz: on the 29th August, 1857), the defendant falsely represented that the bank was then sound and solvent and in a flourishing condition; that the stock was then worth one hundred and five cents to the dollar, and the then accruing dividend; and that the bank then had no bad or protested paper, each of which representations was known by the defendant to be false at the time it was so made. That their truth or falsity (except as to certain paper held by the bank) was unknown, in fact, to the plaintiff, and that the plaintiff relied on the representations in making the purchase of the stock. He further found that on the 2d September, 1857, the drafts of the bank, drawn on the Nassau Bank, the redeeming agent of the Huguenot Bank, were protested to the amount of several thousand dollars; that on the 17th September, 1857, the bank was legally declared insolvent, and that on the 27th September, the plaintiff tendered to the defendant a reassignment of the stock, and demanded a repayment of the sum of \$2,123.33, the amount paid therefor. The judgment of the referee upon these facts was that the plaintiff was entitled to have the contract of sale rescinded, and to recover back from the defendant the sum paid for the stock, with interest. That judgment having been affirmed at a general term of the supreme court, the defendant appealed to this court.

John K. Porter, for the appellant.

I. The plaintiff, as an officer of the bank, entrusted with the supervision and management of its affairs, and with full means of knowledge of its condition, cannot make title to damages, through his neglect of duty and inattention to his trust.

1. Want of notice of the condition of a bank is not available to one who is bound as a director to know its

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condition. By accepting that office, he assumed a duty to the stockholders and creditors of the bank, to inform himself of what would appear by an inspection of the books of an institution of which he was one of the ostensible managers; and he cannot found an action on his own neglect of duty. (*Gillet v. Phillips*, 3 Kernan, 117; *Ketchum v. Bank of Commerce*, 3 Am. Law Regr. 168.)

2. The plaintiff having the means of knowledge is chargeable with notice, and cannot complain of being misled as a consequence of his own negligence. (*Kennedy v. Green*, 3 Mylne & Keene, 719, 721; *Carr v. Hilton* 1 Curtis' C. C. R. 390.)

II. The referee erred in admitting the evidence to which he gave effect in his report.

1. The admission of the certified copy of the proceedings upon the re-establishment of the bank was especially mischievous; and it was plainly immaterial to the true issue, and incompetent as against the defendant.

2. So far as he was concerned, the statements in the petition were merely hearsay, many of them upon the information and belief of the petitioners, who were themselves competent witnesses.

3. The introduction under the prior ruling, of the defendant's testimony before a referee, on a specific inquiry foreign to the issue on the trial, was in itself sufficiently objectionable; but to this was superadded the testimony of the receiver on that occasion, a witness not sworn on the trial.

4. The estimates of the referee, as to the amount and value of the then assets of the bank, were thus brought in, as material and competent evidence as to the truth of the defendant's representations in regard to the condition of the bank on the 29th of August, 1857.

5. There was no authority in law for the introduction of a certified copy of proceedings of that character.

6. So far as the legal rights of the defendant were concerned, these proceedings were *res inter alios acta*. (*Darrin*

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v. *Hatfield*, Selden's Notes, Dec. 1852, 36; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438.)

7. The evidence of subsequent losses by the bank by compromises, made by the plaintiff and the other directors, and not by the defendant, was equally irrelevant and incompetent.

M. Schoonmaker, for the respondent.

Upon the facts as found, the referee was right in adjudging that the plaintiff was entitled to have the contract of sale, set forth in the proceedings, rescinded, and recover back, from the defendant, the sum paid for the stock with interest.

I. By the facts found, it expressly appears that in negotiating the sale, and at the actual sale and transfer of twenty shares of the Huguenot Bank stock, by the defendant to the plaintiff, the defendant made false representations to the plaintiff and his agent, upon existing and material facts, knowing them, at the time, to be false, and that the plaintiff was thereby deceived and induced to make the purchase. The principles of law are familiar and well established, and founded in justice, that whenever a vendor, in the sale or negotiation for the sale of goods, or property, affirms that which he knows to be false, or does not know to be true, to another's loss and his own gain, he is responsible in damages, or the contract may be rescinded. The one who misleads or abuses the confidence of another, by false statements, in the substance of a purchase, shall be the sufferer instead of his victim. And even if by concealment of known facts the vendor violates any trust or confidence reposed in him by the buyer, the sale is fraudulent and may be rescinded. (*Upton v. Vail*, 6 Johnson, 181; 1 Story on Contracts, § 506, page 608 and note; 1 Story Equity, § 192; 2 Story on Contracts, § 842.)

II. The plaintiff is not, by reason of his being one of the

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directors of the bank, estopped from setting up in this suit his actual ignorance of the affairs, situation and condition of the bank and the value of its stock.

1. The doctrine of estoppel against a director applies to cases where he is sought to be made liable by the people or strangers, either for omissions or commissions, by himself or his agents, in connection with the affairs and business of the bank. In such case it is founded upon well settled principles of public policy, which will not allow a person to hold himself out to the world as the director or manager of an institution, and then, when sought to be made liable by the people, or creditors of the institution, avail himself of the plea of ignorance, to repudiate the acts or omissions of himself or his agents. It is also upon the further principle that the cashier and other officers of the bank, are the agents of the directors, and the directors are as between them and third parties, held responsible for the acts of their agents.

2. This case is one of a very different character; it is a dealing between a director and cashier, in relation to some of the stock of the bank, and a negotiation in relation to its sale and transfer by the cashier to a director. It is not a matter at all connected with the business of the bank, or its management. On the one side was the defendant, the cashier and financial agent of the institution, whose special business it was to manage its pecuniary affairs, take the immediate charge, personal superintendence and control of its business generally and particularly, and keep an accurate account and knowledge of its assets, loans and liabilities, and all other matters essential to be known, to ascertain the value of the stock and the condition of the institution. On the other side was the plaintiff, one of the directors, who, as the cashier well knew, took no part in the management of the institution; was not upon any of its business committees; had no means of information or knowledge in relation to the condition or affairs of the

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bank, other than that which he was able to obtain from the cashier himself, or from an inspection of the books and papers, kept by the cashier in his immediate possession and control; and who, at the outset, notified the cashier that he knew nothing about the condition of the bank or value of its stock, and depended entirely upon his representations as a guide. There is not, therefore, in this case, any ground or propriety for the application of the principle of estoppel, and the rules of public policy governing the liability of directors in other cases.

III. No errors occurred on the trial in relation to the admissibility of evidence, or otherwise, to entitle the defendant to a new trial, and the several exceptions taken by the defendant, in the course of the trial, to the admission of evidence, were not well taken.

1. In stating the transaction, negotiations and contract, in reference to the sale and transfer of the stock, it was right that the entire conversation should be given, and there was no error in the admission of testimony.

2. Subsequent conversations and transactions are proper evidence for many purposes; among others: To corroborate plaintiff's version of the transaction; to show falsity of representations; to show injury in fact derived from the misrepresentations; to show that a large amount of assets were bad and unavailable; to show knowledge on the part of defendant; and many other material facts.

3. The action being based upon fraud in the sale and fraud in the warranty and representations, the referee was right to refuse to strike out the testimony of Garret and Jacob Lefever.

4. The testimony of Nathan Lefever, given before a referee, was properly introduced and admitted as a declaration or admission of his.

5. The proceedings in the matter of the Huguenot Bank, were proper evidence for various purposes: To show the time that bank went into hands of a receiver; to prove allega-

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tions in the complaint; to show declarations and admissions of defendant. It was necessary to introduce the whole record, or the paper would have been incomplete.

6. The cross-examination of Eltinge and others, in reference to the Murray and Davis, and the Barculo and other papers, among the bills receivable, and the responsibility of the parties to the paper, was proper in reference to the value of the assets of the bank, and to test the accuracy of Eltinge's estimate, as to such value. Also, to test the correctness of his evidence upon his direct examination, that \$10,000 would cover all losses since August 29, 1857, which, if proper for defendant to prove, was proper for plaintiff to disprove. Objections to such testimony were properly overruled.

IV. The motion for a non-suit was properly denied. The plaintiff had proved sufficient to entitle him to recover.

V. This court has no power on appeal to examine into the correctness of the findings of fact by the referee. Its power is limited entirely to questions of law arising upon the trial, and upon the facts as found and established by the referee. (Code, § 268; *Dunham v. Watkins*, 2 Kernan, 556.)

WRIGHT, J. The representations made by the defendant, which the referee finds to be untrue, and on which the plaintiff relied, he being ignorant in fact of their truth or falsity (except as to certain protested paper), related wholly to the condition of the bank and the value of its stock. One of the questions is whether the plaintiff, being a director of the bank, entrusted with the supervision and management of its affairs, is estopped, in a suit of this character, from setting up his actual ignorance of the condition of the bank. In any matter or controversy connected with the business of the bank, or its management, it is clear that want of notice of its condition would not be available to him. Upon well settled principles of public policy, he

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would not be allowed to hold himself out to the world as the director or manager of an institution, and then, when sought to be made liable by the people or creditors of the institution, avail himself of the plea of ignorance to repudiate the acts or omissions of himself or his agents. But this case has no relation to the business of the bank or its management. It was simply a sale of stock by one officer of the bank to another; and, although the vendee was a director, having the means of knowledge, he was not in the particular transaction chargeable with notice of the condition of the bank. If he was *actually ignorant* of its condition, the fraudulent vendor would be legally responsible to him for the deceit as to any stranger to the institution. It was not a case in which the plaintiff was legally bound to know the truth or falsity of the defendant's affirmations.

On the trial the solvency and prosperous condition of the bank, and the value of its stock, were important inquiries. If the defendant's representations were not false in these respects when made, then there was no ground for the action. The evidence showed very plainly that on the 29th August, 1857, the time of the alleged sale and transfer, the bank was, by the application of all the *ordinary* tests, sound, solvent and prosperous, and the stock worth all that the defendant had represented it to be. But the referee holds that the plaintiff might show, by indirection, and the merest hearsay testimony, that the facts were otherwise; and having received the evidence, he gave effect to it in his report. Accordingly he allowed the introduction, under objection, of what purported to be a certified copy of the proceedings had in November, 1857, on the petitions of certain stockholders for the re-establishment of the bank. Among the papers thus admitted was the petition of the stockholders, stating, on information and belief, the amount of bills receivable; assuming to state the inadequacy of the available fund to pay the debt

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of the bank to the state treasury, and avoiding it by alleging the responsibility of the sureties; representing many of the debtors of the bank as embarrassed and crippled by the commercial revulsions, and stating the petitioners' apprehension of disaster from the judicial administration of the fund, under the receivership. Another of the papers was the deposition of the receiver of the bank, embodied in the report of the referee. In this was stated the facts of the protest of \$11,150 of the bills by the Nassau Bank, and that the amount of bills receivable was \$27,000. Appended to the referee's report was his estimate that from one-eighth to one-quarter of the bills receivable would prove uncollectable; his estimate of the then amount and value of the bank assets; also the receiver's accounts, showing the large expenses incident to the receivership, the sacrifice of the New York state stocks at panic prices, ranging from eighty-seven and one-half cents to ninety-five cents, and other losses of a kindred character.

To these proceedings in the matter of the bank, the defendant was in no sense a party. It may be that by competent evidence the plaintiff would have been allowed to show the condition of the bank in November 1857, with the view of falsifying the defendant's representations of its condition in August, 1857. But this would be allowing a wide range of examination even where the question involved was one of fraud. It was especially mischievous in this case; for between the date of the contract and November, 1857, the great commercial revulsion and panic of that year had occurred, and was at its height, unsettling commercial values, crippling and embarrassing all classes pecuniarily, occasioning a suspension of specie payment by all the banks, and prostrating temporarily even the state credit. If such a latitude of investigation, however, was permissible, it could only be pursued by the introduction of competent proof. The petition of the stockholders to re-establish the bank, the affidavit of the receiver, and the estimates

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of the referee, as to the amount and value of the then assets of the bank, were clearly incompetent as against the defendant. So far as he was concerned, the statements in the petitions were mere hearsay, many of them upon the information and belief of the petitioners, who were themselves competent witnesses. This was also the character of the affidavit of the receiver before the referees (a witness not sworn on the trial), and of the estimates of the referee as to the amount and values of the assets of the banks in November, 1857. Instead of swearing witnesses on the trial as to the condition of the bank, and the value and amount of its assets, when taken out of the hands of the receiver, (regarding such evidence as material and competent on the question of the truth or falsity of the defendant's representations in respect thereto, made in August, 1857,) the referee allowed second hand proof of the facts; and what is quite apparent, in a degree, at least, based his report upon such proof. It may not have been strictly objectionable to have allowed the affidavit of the defendant, embodied in the report of the referee, to be introduced with the view of showing his declarations and admissions; but on no principle was the testimony of the receiver, the hearsay testimony of certain stockholders of the bank, and the estimates of the referee as to the amount and value of its assets, in a process between other parties, admissible. It is urged that the record of the proceedings was proper evidence to show the time that the bank went into the hands of a receiver, and the declarations and admissions of the defendant, and that it was necessary to introduce the whole record, or the paper would have been incomplete. Suppose, however, it was incomplete, it could certainly be no reason for the introduction of improper evidence. If it were a proper way to prove the fact that the bank went into the hands of a receiver, on the application of some of its stockholders, on the 18th September, 1857, it could have been shown by the order or decree of the judge; and

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if the declarations or admissions of the defendant as to the condition of the bank, made in a proceeding to re-establish the institution, were competent evidence, his affidavit containing these declarations and admissions, could have been introduced. Indeed, it was introduced and admitted, under objection, before the other papers were received.

I am of the opinion, therefore, that the referee erred in admitting as evidence what is called in the case a certified copy of the proceedings upon the re-establishment of the bank, except perhaps the order of the court appointing a receiver and the testimony of the defendant before the referee, embraced therein. The referee found that the representation of the defendant that the bank was in a sound, solvent and prosperous condition in August, 1857, was false, and the defendant knew it; but the statement of persons not sworn on the trial, and in fact the unsworn statement of one as to the condition of the bank in November, 1857, were not competent evidence on which to base such a finding of fact.

The judgment of the supreme court should be reversed, and a new trial ordered, with costs to abide the event.

INGRAHAM, DAVIES, SELDEN, MULLIN and JOHNSON, JJ., concurred.

HOGEBROOM, J. (dissenting.) This action was brought to recover back money paid on a transfer of twenty shares of the Huguenot Bank, on account of false and fraudulent warranty and representations and concealment as to the condition and value of the stock and assets and protested paper of the bank. The case was referred to a referee. The evidence was conflicting. The referee found on sufficient and apparently preponderating evidence, that the alleged representations were made; that they were false in fact; that they were in effect fraudulent, that is made with knowledge on the part of the defendant of their falsity; and that the plaintiff relied upon them in making the pur-

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chase of the stock. The supreme court at general term, affirmed the judgment. I discover no ground upon which *on the merits* this decision can be disturbed. Even if it were open to review in this court upon the facts, the evidence is of such conflicting character, as makes it proper to sustain the decision of the original tribunal on the question of facts.

The real difficulty, if any, arises on the admission of evidence by the referee, and in this particular he is supposed to have committed grave errors. The more important of these, as alleged, consist in the admission of evidence of the proceedings connected with the insolvency of the bank and the judicial declaration of that fact; the appointment of a receiver; his subsequent removal, and the testimony of the defendant taken before a referee in those proceedings. To determine these facts correctly, it will be necessary to look with some care into the case, and observe the manner in which, and the purposes for which this testimony was introduced.

The plaintiff having introduced his own testimony, and that of his son and one or two other witnesses, as to the representations and declarations of the defendant, and of a clerk of the bank as to its condition, assets, debts and papers, offered to read in evidence the testimony of the defendant, Nathan Lefever, taken before J. B. Jewett, the referee in the matter of the Huguenot Bank, in pursuance of an order granted therein November 9th, 1857, as reported by said referee in his report, dated November 19th, 1857.

"The defendant objected (to the offered evidence) upon the ground that it was taken after the suspension of the bank, and related to the condition of things then existing, and at the time of the sale of the stock, and that it was improper and immaterial to any of the issues in this action. The objection was overruled by the referee, and the evidence received, subject to any objection that might be thereafter raised to the same: to which decision the defendant

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excepted. The plaintiff then offered in evidence a certified copy of the proceedings upon the re-establishment of the bank. The defendant objected to the introduction of the evidence, upon the ground of its immateriality, and that it was an improper mode of proving the misrepresentations alleged in the complaint. The referee overruled the objection, and admitted the evidence, subject to any objections on the part of the defendant that might be thereafter made; defendant excepted to the decision."

The proceedings thus far stated in regard to the offer, objection and admission of this evidence are stated in the language of the case. Immediately following this statement, and without any further or intervening matter, the case contains and gives in detail the following papers, apparently, so far as we can judge, forming one entire and connected series, to which a single certificate of attestation is attached. These papers are as follows:

1. A petition of stockholders of the bank stating its actual or apprehended insolvency, and praying for an injunction and receiver.

2. An order for a temporary injunction, and to show cause why it should not be continued and a receiver be appointed.

3. An absolute order of injunction and for receiver.

4. A petition praying for an order vacating the injunction and appointment of receiver.

5. Various consents of stockholders and creditors and others to such last named order.

6. An order of reference to Jacob B. Jewett to inquire and report as to the matters of the last named petition.

7. Notice of motion for an absolute order on said petition, and on the referee's report.

8. Report of referee last referred to, in which report is embodied the testimony of the defendant, *Nathan Lefever*, and the receiver, John Sleight.

9. An order vacating the order granting the injunction

and appointing the receiver, and making provision for taking the account of the receiver before the same referee, with other directions,

10. Report of referee under last named order.

11. Certificate of referee that the receiver had complied with the requisitions of the last named order, and paid over the moneys in his hands.

12. Certificate of the clerk of Ulster county, that he had compared the foregoing with the originals on file in his office, and that they were true copies.

The only ground of objection made to the offered evidence of the defendant's testimony was "that it was taken after the suspension of the bank, and related to the condition of things then existing, and not at the time of the sale of the stock, and that it was improper and immaterial to any of the issues in this section." This, of course, did not embrace an objection to the form in which it was presented, as that it was one of a connected series of papers, and should be detached from the others; or that it was contained in a referee's report, instead of being established by original and independent evidence. Such objections are, therefore, waived.

This testimony of the defendant's declarations cannot be said to have been wholly incompetent and immaterial; for it contains evidence by the admission of the defendant of his official position and connection with the bank—of its capital, its circulating notes, its securities, its indebtedness, its assets—at the time of the suspension of the bank, and of its collectable and uncollectable paper, all of which was pertinent to some of the issues in the case.

The objection to this testimony was, therefore, properly overruled, and the manner in which it was admitted by the referee, "subject to any objection that might be thereafter raised to the same," while it would not probably debar the defendant from availing himself of any direct substantial and unanswerable objection to the testimony, without

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further specification, was at the same time a pertinent admonition, as well as a liberal suggestion to the defendant, that if he desired to make any technical or specific objection to the testimony afterwards, he might and must do so. None such was made.

The case does not show whether upon such decision the evidence was directly introduced. I infer not, for it did not immediately follow, and the case goes on to state, "the plaintiff then offered in evidence a certified copy of the proceedings, upon the re-establishment of the bank." As before shown, the evidence of the defendant was contained in these proceedings, and it is fair to infer that one of the objects in offering them was for the purpose of introducing these declarations of the defendant. If so, and if this was one set of papers, forming a single record or proceeding, (and I think it was treated as such;) the evidence was admissible, notwithstanding it embraced other papers inadmissible by themselves as independent evidence, but not objectionable as forming inseparable portions of a single document or connected series of papers on file, which could not be dissected or mutilated; which other papers it is perfectly obvious were never intended to be used as primary evidence in themselves of the facts recited in them.

These proceedings may have been offered for another purpose, to wit: for the purpose of showing the insolvency of the bank, judicially declared, and the appointment of a receiver within less than a month after the representations of its soundness and solvency were made by the defendant to the plaintiff. These judicial proceedings were averred in the complaint, and were, therefore, proper to be proved. The proceedings upon the re-establishment of the bank themselves contained evidence—admissible evidence—of these proceedings, recognized the insolvency of the bank, the granting of an injunction and the appointment of a receiver, contained a certificate of the defendant of these facts, and also his testimony before referred to. They

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were moreover connected with and a part of the proceedings taken to establish the insolvency of the bank, the granting of an injunction and the appointment of a receiver. They seem to me, therefore, to have been admissible, and to have been intended for one of the legitimate purposes before named. If designed simply to prove the re-establishment of the bank, they would be so wholly immaterial, indeed, so directly beneficial to the defendants, that I think we would be at liberty to overrule the objection on the ground that they could not by possibility prejudice his interests.

The referee saved to the party the right of subsequent specific objections, which not being made, we are at liberty to conclude the evidence was offered and received only for some of the lawful objects before mentioned; and I am not inclined to give effect to an objection technical in its character and failing to present itself in a clear and obvious aspect to the referee, himself a competent lawyer, for the purpose of overthrowing a decision which we can see was not unwarranted by the testimony in the case.

These remarks embrace, I think, all that is material to be specially considered in the points or argument of the counsel for the appellant. The objections to other portions of these proceedings, that the statements in the petition were mere hearsay; that the referee's unsworn statement was in effect received in evidence; that his estimates were allowed to have weight in the final disposition of the cause; that evidence was received of subsequent losses and compromises; that there was no authority in law for the introduction of a certified copy of proceedings of that character—with other minor objections suggested in the points or on the argument are all disposed of, I think, by the remarks already made, and are susceptible of one of two conclusive answers:

1. As to many of them the objections were not taken at the hearing.

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2. As to all of them the papers were not admitted or used for any such purpose, as is assumed in the objections.

I think, on the whole, that the merits of the case were fairly tried; that no well founded objections to the evidence appear in the case or were fairly presented to the mind of the referee; and that the judgment of the court below ought to be *affirmed*.

DENIO, Ch. J. concurred with HOGEBROOM, J. Judgment reversed.

Statement of case.

THE FORT PLAIN BRIDGE COMPANY v. SOLOMON SMITH, and others.

It is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right to do so is expressly prohibited by the first grant.

Where the charter of a bridge company prohibited the erection of any other bridge within a mile of that to be erected by the grantees, and the section containing that prohibition was subsequently repealed; *Held*, that the grantees of the franchise stood in precisely the same position, in reference to a second bridge, that they would have done if no such prohibition had been contained in their charter.

Assuming that the Mohawk river is a public highway (though it is no longer navigable, except to a very limited extent), and that a bridge over it is an obstruction to navigation and therefore a public nuisance, yet no one has the right to abate it, or to sustain an action for damages occasioned by the erection thereof, unless he has himself sustained some damage not suffered by the rest of the community.

Though a bridge over a navigable stream may be a nuisance to those navigating it, it does not follow that it is a nuisance as to others who do not navigate it.

The Fort Plain Bridge Company having no exclusive grant of the right to maintain their bridge over the Mohawk river and take toll, it follows that every other bridge built over the stream, which does not impede navigation, is lawfully erected, and is not a public nuisance; and no action for damages will lie, for its erection.

If it does impede or impair navigation, it is a nuisance as to those navigating, but not as to any others.

There are three cases in which authority from the legislature is necessary to erect a bridge over a stream: 1. Where the stream is navigable. 2. Where the state owns the bed of the stream; and 3. Where the right to take toll is desired.

Where the bed of a stream belongs to the state, no person has the right to use the same without its consent; but so long as the state officers make no objection to such appropriation, no individual or corporation has a right to complain of it.

THIS is an appeal by the plaintiff from a judgment of the supreme court, rendered in favor of the defendant, in the fourth district.

Statement of case.

The action was brought to restrain the defendants from erecting a free bridge across the Mohawk river at Fort Plain, in the county of Montgomery, to the injury of the franchise and property of the plaintiff, and for general relief, it being claimed that the acts of the defendant were unlawful. After issue joined, the cause was tried by a referee, who gave judgment for the defendants. The leading facts of the case are as follows: In 1827 the plaintiff was incorporated by an act of the legislature, and authorized to erect a toll bridge for public use, across the Mohawk river at the village of Fort Plain. In pursuance of this act a bridge was erected, and has been ever since maintained for public use, and for the use of which the plaintiff was authorized to collect and has been accustomed to collect a reasonable toll, and by this means have been in the receipt of an annual revenue of about \$500. In the sixth section of the act giving the plaintiff the authority to construct the bridge, there was a restriction against the erection of any other bridge within a mile on either side. This section was repealed by an act of the legislature passed April 15th, 1857. In July, 1857, the defendants, without having obtained any special authority from the legislature, commenced the construction of a free bridge designed for public use, across the Mohawk, at Fort Plain, just above and within forty-nine feet of the bridge of the plaintiff, locating two stone piers to support it in the channel of the river. They had previously acquired the right to the land upon each side of the river upon which each end of the bridge rests, and the proper authorities of the town of Palatine, upon the one side, had laid out a public road to connect with the bridge on that side, and the trustees of the village of Fort Plain had opened a public street to connect with the other end, upon the southerly side of the river. The object and effect of these proceedings was to utterly destroy the value of the plaintiffs' franchise and property, inasmuch as all travelers pass

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over the defendants' bridge, and none over that of the plaintiffs. The referee found the fact that the Mohawk was a public river, and that for a long time prior to the construction of the Erie canal, it had been used for the purposes of public navigation, for the transportation of persons and property, and formed part of an extensive line of internal communication between Utica and Schenectady, conducted by means of different water craft. That since the completion of the Erie canal, in 1825, the actual navigation of the river had ceased, except that at various times rafts of logs and lumber had been floated down, up to as late a period as 1852. At points in the river above the plaintiffs' bridge, the state had caused to be erected dams, totally obstructing navigation at those places, and from the ponds made by these dams water is drawn, in the dry seasons of the year, for the supply of the Erie canal.

The judgment directed by the referee having been affirmed at a general term of the supreme court, the plaintiff appealed to this court.

John H. Reynolds, for the appellant.

I. By the common law grants of franchise, without any provision making them exclusive, were construed as exclusive, so far as to protect the grantee from any interference, directly or indirectly, which tended to impair the value of the franchise. This rule obtained as against the government as well as individuals, and any invasion of a franchise was a nuisance, for which the aggrieved party had his remedy at law by action on the case, for the disturbance, or by bill in equity, and an injunction to restrain the injurious act. (3 Kent's Com. 495, and note [8th edition, pp. 573, 574, and note]; *Yard v. Ford*, 2 Saund. R. 172; 2 Blackstone's Com. 37, 3; *id.* 218, 219; *Tripp v. Frank*, 4 Term R. 666; *Keeble v. Heckirengall*, Holt's R. 20; *Croton Turnpike Road v. Ryder*, 1 John. C. R. 611; *Newburgh*

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Turnpike Company v. Miller, 5 J. C. R. 111; *Dartmouth College v. Woodward*, 5 Wheaton R. 518; *Huzzey v. Field*, 2 Crompton, Meeson and R. 432.)

1. This doctrine is so far modified by recent decisions that it may now be claimed that where the grant of franchise does not express that it is an exclusive privilege, it will not be so construed as against the sovereign, and perhaps not as against individuals in the exercise of a purely private right.

2. The case of the *Charles River Bridge v. Warren Bridge* (11 Peters, 420), arose upon two conflicting grants, by the legislature of Massachusetts, and the decision was that the prior grant of a franchise, not in its terms exclusive, did not preclude the legislature from granting another franchise, to be exercised so near the first as to interfere with and destroy it. This case does not determine that the proprietor of a franchise, granted by the sovereign, not in its terms exclusive, has no remedy against a disturber, who is proceeding to exercise a franchise, without any authority of government.

3. The case of the *Auburn and Cato Plank Road Company v. Douglass* (5 Selden, 444), arose between a plank road company, operating under the general statute, and the owner of land adjoining the plank road; and the question was whether the company could, in any respect, limit or restrict the use, which the owner might make of his land, prejudicial to the interests of the corporation, and it was held that it could not take any right, as against an adjoining land owner, by implication.

4. The doctrine of these cases does not necessarily affect the plaintiff's right of action, for here the complaint is that the defendants, without authority from the government, are by their acts usurping a right of sovereignty, vested in the state, by the erection of a public bridge over a public river. We insist that these acts amount in law to a public nuisance, which may be abated by the public

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authority, and as they injuriously affect the plaintiff, a private action is maintainable.

II. The Mohawk river is a public navigable river, so far at least as to subject the right of the adjoining owners to the servitude of the public, for all the purposes of passage or navigation. This has been adjudged by the court of last resort as the law applicable to this river. (*Canal Commissioners v. The People*, 5 Wend. 423, 438, *et seq.*; *The People v. Canal Appraisers*, 13 Wend. 355; *The Canal Appraisers v. The People*, 17 Wend. 571.)

1. It is matter of history that prior to the completion of the Erie canal, the Mohawk river, between Schenectady and Utica, was actually navigated by scows and other vessels in the transportation of property.

2. And it is equally notorious that for at least a century the government of the colony and state have claimed and exercised jurisdiction over it as a public river. (See 17 Wendell, 571; Opinion of Senator Beardsley, pages 574, 609-10-11; Opinion of Senator Tracy, p. 575, 624; also Statutes cited, p. 578.)

3. It is, in legal sense, a navigable river; the public right of navigation exists, and the riparian owner holds, subject, in all respects, to this public servitude. In its natural state it was a navigable river. The fact that it is not actually used for purposes of navigation, or that dams and other obstructions have been permitted by the legislature, does not change the character of the river, or the public dominion over its waters. (*Browne v. Scofield*, 8 Barb. 239; *Arundel v. McCulloch*, 10 Mass. R. 70; *Commonwealth v. Charlestown*, 1 Pick. 180; *Charlestown v. Middlesex*, 3 Metcalf, 202; *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. 40, 54.)

4. And every obstruction by a private person in waters over which the public jurisdiction exists, is a public nuisance, and may be abated by the public authority, and if

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specially injurious to any particular person, a private action can be sustained. (5 Wend. 449; *Ex parte Jennings*, 6 Cowen 518; *Lansing v. Smith*, 4 Wend. 9, 24, 25; *Browne v. Scofield*, 8 Barbour, 239; Angell on Water Courses, 5th edition, § 756; *Rose v. Graves*, 3 Dowl. Pr. Cases, n. s. 61.)

5. The result must therefore follow that if it be determined that the act of the defendants in placing their piers in public waters without legislative authority be a public nuisance, and by means of this wrongful act the plaintiffs are threatened with an injury peculiar to themselves, a private action to redress or prevent the threatened injury may be maintained.

6. And the application of this remedy is as proper in the case of a corporation, whose legal rights are invaded or threatened, as in the case of a private person.

III. The acts of the defendants amount to the usurpation of a franchise, and an invasion of the rights of sovereignty vested in the people of the state, and the plaintiffs are entitled to be protected against the consequences of this unauthorized assumption of the public prerogative.

1. The defendants propose to erect a bridge for the use of the public, over a public river, and connect it with public roads, for the use of all the citizens of the state. It is in no sense a private structure. (4 John. Ch. 150, 160; 5 Id. 101, 110; 1 Pick. 87; 7 Id. 515; Harg, L. T. 11 Ch. 6.)

2. A bridge is a mere substitute for a ferry (per Savage, Ch. J. 15 Wend. 133), and the right to establish a public ferry is a franchise vested exclusively in the sovereign, and no person without sovereign authority can establish a public ferry. (*Ex parte Jennings*, 6 Cowen, 518, note; 5 Selden, 454, per SELDEN, J.; *Blissett v. Hart*, Willes, 508; *The Croton Turnpike Company v. Ryder*, 1 J. C. R. 611; *The Newburgh Turnpike Company v. Miller*, 5 Id. 101; 3 Kent's Com. 459, note.)

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3. The fact, that the bridge proposed to be erected by the defendants is to be free of toll, does not make it any the less the exercise of a franchise. It is not necessary to the creation of a franchise, that the grant should authorize the grantee to exact toll. It is the nature of the right or privilege which is to be exercised, that determines the question whether it is or is not a franchise, and not the extent of the profit which the grantee may derive from its exercise.

Franchises are special privileges conferred by government on individuals, and which do not belong to the citizens of the country, generally, by common right. (*Bank of Augusta v. Earle*, 13 Peter's U. S. 515; Angell and Ames on Corp. § 4.) In England, it is said that a franchise is a royal privilege, or branch of the king's prerogative, subsisting in a subject by a grant from the crown. (3 Greenleaf's Cruise, title Franchises.)

2. The exercise of a franchise without legislative authority, is a usurpation and a public nuisance "and like every other nuisance subjects the party not only to a public prosecution, but to a private suit by any person specially injured thereby." (Per SELDEN, J., 5 Selden, 444, 445.)

6. The plaintiff's franchise was granted by the proper public authority. It may not be regarded exclusive as against the sovereign, or those who may be vested with the sovereign rights; but it cannot be doubted that the proprietor of a franchise is to be protected against the consequence of all wrongful acts. The whole extent to which the ancient doctrine of the common law has been modified in this respect is, that the grantee of a franchise is at all times subject to have his franchise rendered valueless by the grant of another, to be exercised so near as to destroy the first. But no court has ever held, that a private person may, of his own motion, set up a rival franchise, and thus substantially destroy a legislative grant.

IV. The Mohawk river being a public river, the defend-

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ants had no right to undertake the construction of a bridge over it for public use, and the erection is a public nuisance, causing special and peculiar injury to the plaintiff, and indeed the erection was designed to destroy the plaintiff's franchise; and such has been the effect.

1. The plaintiff's right does not depend upon the question how far the erection of the bridge by the defendants constitutes an obstruction to the navigation of the river. (*Inhabitants of Charlestown v. County of Middlesex*, 3 Metcalf, 202, per Ch. J. Shaw, 205, 206.)

2. And upon an indictment as for a nuisance, the defendants could not defend by showing that the bridge was, on the whole, a public benefit. (*Rex v. Ward*, 4 Adolph. & Ellis, 384; *Regina v. Betts*, 22 Eng. L. & Eq. 240.)

3. Here, by the usurpation of a public right and the commission of an unlawful act the plaintiff is threatened with peculiar injury, and the remedy of the plaintiff cannot be destroyed by saying after all the wrongful act benefited the public.

4. If the defendants had undertaken to erect a bridge and collect toll the act would unquestionably be unlawful. The fact that it was a free bridge, only made the erection more injurious to the plaintiff. (*Aikin v. W. R. R.* 20 N. Y. 379, per Selden, J.)

V. The case was a proper one for the interference of a court of equity, by injunction, to prevent irreparable injury. (Angell on Water Courses, 5th ed. § 444, et. seq.; Story Eq. Jur. § 925; *Smith v. Adams*, 6 Paige, 435; *Mohawk Bridge Company v. U. & S. R. R. Company*, 6 Paige, 554.)

1. But as the supreme court refused to restrain the erection by an injunction, and at the time of the trial it appeared that the defendants' bridge had in fact been constructed and had destroyed the entire value of the plaintiff's property, damages should have been awarded the plaintiff according to the case made at the trial, without regard to

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the prayer of the complainant. (*Marquat v. Marquat*, 12 N. Y. 336; *Emery v. Pease*, 20 N. Y. 62.)

2. But if the only remedy of the plaintiff is in a court of law, by action for damages, the judgment given in this action should be without prejudice to such action at law.

John K. Porter, for the respondents.

I. At the time the free bridge was erected, the plaintiffs had no exclusive right to maintain a bridge across the Mohawk at Fort Plain.

1. They never had any such exclusive right, except under the sixth section of the act of 1827. That section is as follows: "And be it further enacted that it shall not be lawful for any person or persons to erect a bridge or establish or keep a ferry across the said river, within one mile from the place where the said bridge shall be erected and built, other than persons residing within that distance, in their own boats, for their own convenience merely." (Laws of 1827, 208, chap. 209, § 6.)

2. The sixth section was repealed by the act of 1857. (2 Laws of 1857, 38, chap. 498.)

3. The authority of the legislature to repeal the restriction is unquestionable.

(1.) The ninth section of the act of 1827 was as follows: "And be it further enacted that the legislature may, at any time, alter, amend or repeal this act."

(2.) "Where, however, a state legislature reserves to itself in the very charter it grants to a private corporation the right of altering, amending or repealing the act of incorporation, a subsequent repeal of such act of incorporation will be valid and constitutional. Such a reservation in the charter of a corporation, upon common law principles, would not be a condition repugnant to the grant, but a limitation to the grant. And if such a reservation at common law would be repugnant to the grant, it is compe-

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tent for a state legislature to alter this rule of the common law. And the reservation of such a power in a legislative grant would of itself change the law in relation to that particular grant." (*McLaren v. Pennington*, 1 Paige, 102, 109.)

(3.) This question, mooted in the case of the *Oliver Lee & Co. Bank*, has been settled finally by the ultimate tribunal on questions arising under the federal constitution. (*Sherman v. Smith*, 1 Black's R. 587.)

(4.) The uniform policy of this state, for nearly forty years, has been against making irrevocable grants of corporate franchises and public monopolies; and the reservation in the case of this corporation, and subsequent legislative revocation of the monopoly, is only one of innumerable illustrations of this policy. (1 R. S. 601, § 8; Constitution, art. 8, § 1.)

II. The monopoly expressly granted to the plaintiffs, having been expressly revoked, they can claim no exclusive right by implication.

1. "Legislative acts granting franchises to corporations are to be construed strictly according to their terms; and the grantees in such acts take nothing by implication, either as against the power making the grant, or against other corporations or individuals." (*Auburn Plankroad Co. v. Douglas*, 5 Seld. 444.)

2. The cases holding a contrary doctrine have been considered and over-ruled, as well in this court as in the supreme court of the United States. (5 Selden, 444; 11 Peters, 521-3, 548, 9.)

3. Even in the absence of a reservation of the right of alteration or repeal, it was recently held in this court that a similar prohibition could be repealed, and that, though the legislature has power to grant an irrevocable monopoly to a bridge company, "nothing but plain English words will do it." (*Chenango Bridge Co. v. Binghamton Bridge Co.* 27 N. Y. Rep. 87.)

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4. The plaintiffs have, therefore, since the repealing act, no exclusive rights in this regard—and no legal rights whatever under the act, as against the defendants—except to exact toll from them, if they choose to cross the plaintiffs' bridge.

III. The title of the defendants to the bed of the river as riparian proprietors, was absolute, except so far as it might be "subject to the servitude of the public interest for passage or navigation," and in this respect no injury to the plaintiffs, past or prospective, was either proved or alleged. (*Commissioners of Canal Fund v. Kempshall*, 26 Wend. 404.)

1. "The public right is one of passage, and nothing more, as in a common highway. It is called by the cases an easement; and the owner of the adjoining land has a right to use the land and water of the river, in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, &c., inconvenient or unsafe, he is guilty of a nuisance; and this is the only restriction which the law imposes upon him." (*Ex parte Jennings*, 6 Cowen, 527, 8.)

2. "The owner of land may put it to any use which does not infringe some fixed legal right of another; loss or damage to one person, arising from the use made by another of his property, being *damnum absque injuria*, unless the former has previously acquired some legal right to restrict the use which the latter shall make of his property. When no such right of restriction exists, it is immaterial what may be the motives of the proprietor for dealing with his property in a particular way." (*Auburn Plankroad Co. v. Douglass*, 5 Seld. 444.)

3. At the conclusion of the opinion in the Chenango bridge case, Judge WRIGHT said: "Upon the whole, I do not think the plaintiffs were entitled to sustain the action. The grant to them was of the right to maintain a bridge across the Chenango river at or near Chenango Point, and

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take certain rates of toll for crossing it; and this was the whole grant. There was no monopoly over the waters of the Chenango river above and below their bridge given to them; nor any undertaking by the state, in the act incorporating them, not to sanction competition, nor to make improvements that might diminish their income. In this respect they have no rights to be impaired, and consequently none which the courts are called upon to protect." (27 N. Y. Rep. 104.)

IV. The erection of the free bridge by the defendants on their own land, was therefore plainly lawful, in respect to the rights of the defendants under the legislative grant.

1. The act incorporating the plaintiffs assumed that others, in the absence of a prohibition, might lawfully, and of right, erect a bridge on either side; and the exercise of this right was accordingly restricted, for one mile above and below, by the sixth section since repealed. (Laws of 1827, 208, § 6.)

2. This legislative assumption is in harmony with the general understanding of the law; and the fact found by the referee, that of the fifteen bridges erected from time to time across the Mohawk between Utica and Schenectady, five only were built by special legislative permission, should be deemed, in connection with the acquiescence of the public and the state authorities, as controlling evidence of the law, as an express declaratory act.

3. The legislative sanction of this bridge by the act of 1860, has the force of a declaratory law, in harmony with the decision of the court below; and the plaintiffs cannot claim to be prejudiced by a decision in accordance with a statute, which would be decisive of the judgment in case of a future trial. (Session Laws of 1860, 400; *White v. Coventry*, 29 Barbour, 305.)

4. The plaintiff's objection to the bridge is, that it enables the public to pass toll-free; but the dedication of a free bridge to public use, is no more the usurpation of a

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franchise, than the dedication of a school house and burying ground.

5. Free bridges have been uniformly distinguished in this respect from toll bridges and ferries, which at common law the owner was bound to repair.

6. Thus "if a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ* or *prescriptionis*." (2 Coke's Institutes, 701.)

7. "Magna Charta only extends to prevent the subject from being compelled to erect new bridges—'*non distringatur facere pontes*'—not to exempt him from repairing those already erected, in case they be public benefits. This is the grand criterion. If a man erect an useless or a mere ornamental bridge, neither he nor the public are bound to sustain it; and if it is principally for his own benefit, and only collaterally of benefit to others, as in the case cited of the bridge to the mill, the public have nothing to do with it. But where it is of public utility, as is expressly found in the present case, the public, which reaps the benefit, ought to sustain the burden of repairing it. Else it would be a great discouragement to public spirited persons to erect a beneficial bridge, provided they must either repair it themselves, or it must run to ruin." (*The King v. The West Riding of Yorkshire*, 2 W. Black. R. 686, 7.)

8. The erection of a free bridge on a stream not navigable, is simply the use by a party of his own for a lawful and beneficial purpose.

V. The plaintiffs are not entitled to a reversal, on the theory that the bridge is, contrary to the finding of the referee, an unlawful obstruction to navigation, and therefore a public nuisance.

1. This is not the ground of the action, nor the case

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made in the pleadings. (*Brazill v. Isham*, 2 Kernan, 9; *Field v. Mayor of New York*, 2 Selden, 179.)

2. The plaintiffs are not, and do not claim to be navigators, or to have been subjected to, or threatened with, any injury in respect to navigation.

3. The river, which was once navigable at this point by the aid of improvements under state authority, has for more than a quarter of a century ceased to be navigable, through drainage by state feeders, and permanent obstructions to navigation interposed by authority of the sovereign.

4. It is found as matter of fact that the bridge did not obstruct navigation, and would not have obstructed it even if the river had been navigable.

5. The plaintiffs cannot tack a claim of special injury, to a public nuisance which is not found, and did not exist.

6. The river at this point was not, in the legal sense, a navigable stream, at the time of the construction of the free bridge. (*Curtis v. Keesler*, 14 Barbour, 518; *Munson v. Hungerford*, 6 Barbour, 265, 270; *Canal Commissioners v. The People*, 5 Wendell, 448.)

7. Upon the facts found, the plaintiffs plainly could not have been convicted under an indictment for nuisance, which alleged that the river was neither navigated nor navigable.

8. Even if the river had been navigable, they could not have been lawfully convicted under an indictment which alleged the fact here specially found, that the bridge was not an obstruction to navigation; for it is only "*prima facie*," that an obstruction in a navigable river is a nuisance *per se*. If it be not injurious to navigation, it is not unlawful. A public nuisance which neither annoys nor injures the public, would be a legal anomaly. (*Hart v. Mayor of Albany*, 3 Paige, 213; *Mohawk Bridge Company v. Utica & Schenectady Railroad Company*, 6 Paige, 555; *The King v. Russell*, 13 Eng. Com. Law R. 254, 266.)

9. "An injunction to the building of a bridge will not be granted, unless the evidence clearly shows that the

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bridge, if erected, would be an obstruction to the navigation of the river." (*Hutchinson v. Thompson*, 9 Ohio Rep. 52.)

10. To constitute the structure a nuisance, it must be a present, substantial obstruction to actual navigation. (*Peckham v. Henderson*, 27 Barb. 210, 211; *City of Rochester v. Curtiss*, 1 Clarke's C. R. 344.)

11. "Where the court is satisfied that the matter complained of is not a nuisance, the injunction is immediately refused or dissolved." (Eden on Injunctions, 160.)

12. In the case of the *City of Rochester v. Curtiss*, the plaintiffs having a bridge, the abutments of which narrowed the channel of the river, asked an injunction to restrain the defendant from constructing a wall immediately above—encroaching as much and no more on the river—on the ground that it endangered their bridge, &c., and also that it was a purpresture obstructing the river, which was by law declared a public highway. Held, that the danger from the erection of the wall was nothing as long as the abutment of the bridge was continued, and that no injunction should be allowed, as long as the city continued their own obstruction by the abutment." As to the other ground of complaint, the court said: "The river is a highway only for particular purposes, viz: for the purposes of navigation; and the river at this point is not navigable. An injunction will not, therefore, be allowed on this ground." (1 Clarke's Chancery Rep. 344; *Hesker v. New York Balance Dock Company*, 24 Barb. 215.)

13. Where the owners of a mill dam at Stillwater, on the Hudson, sued for damages caused by the erection of a dam immediately above, LIVINGSTON, J., said: "Whatever their pretensions to build a dam and mills adjoining their own land may have been, it must be conceded that, as far as the public is concerned, the defendants had the same right opposite their ground, provided it could be done

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without injury to the navigation of the river." (*Palmer v. Mulligan*, 3 Caines, 313.)

14. The two instances in a period of twenty-three years, in which logs were got through Fort Plain, do not make the river at that point a navigable stream. (*Munson v. Hungerford*, 6 Barb. 265; *Curtis v. Keesler*, 14 Barb. 511.)

15. The plaintiffs not being interested in navigation, were in no position to assert the rights of navigation, or to demand that the defendants be restrained, in that regard in the use of their own property.

16. "The remedy to prevent the erection of a purpresure and nuisance in a bay or navigable river is by injunction at the suit of the attorney general." (*People v. Vanderbilt*, 25 Howard's Practice Rep. 140, 142. In court of appeals.)

VI. In no view of the case were the plaintiffs entitled, upon these findings, to a decree for a perpetual injunction.

1. Every intendment of law as well as fact is to be made in support of the judgment, on appeal. (*Carman v. Pultz*, 21 N. Y. 547; *Viele v. Troy and Boston Railroad Co.*, 20 N. Y. 184.)

2. The application was one to restrain the defendants in the use of their own property—one never to be granted except in extreme cases. (*Lasala v. Holbrook*, 4 Paige, 169; *Myers v. Gemmel*, 10 Barb. 537.)

3. They failed to present to the court below a case of clear and undoubted legal right. (*Fisk v. Wilber*, 7 Barb. 395, 401, 2.)

4. Their remedy by action was ample, if they could maintain their claims in a court of law. (*Jerome v. Ross*, 7 John. C. R. 315; *Fisk v. Wilber*, 7 Barb. 395.)

5. Works of a public nature are not arrested by injunction, unless in cases of clear illegality and imminent and irreparable injury. (*Drake v. Hudson River Railroad Company*, 7 Barb. 508; *Livingston v. Tompkins*, 4 John. C. R. 415; *Gibbons v. Ogden*, 17 John. 488.)

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6. Thus, in the case of *Barnes v. Calhoun*, where an injunction was sought against interfering with a stream by the erection of a mill, flooding the land of an adjoining proprietor, the court said: "If the plaintiff, indeed, were without any other remedy, we should feel ourselves bound to interpose in his behalf; for the act contemplated by the defendant is an admitted wrong." But even on this state of facts, it was held that it was discretionary with the court to grant or refuse a decree for an injunction; and the bill was dismissed on the ground that a court of equity "will only act in a case of necessity, where the evil sought to be prevented is not merely probable but undoubted; and it will be particularly cautious thus to interfere, where the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience." (2 Iredell's Equity Rep. 199, 201, 2.)

7. The bridge had been constructed long before the hearing, and an injunction would have been ineffectual by way of prevention—the only purpose for which it is legitimate.

8. A court of equity has jurisdiction to a certain extent in cases of public nuisance, although it has been rarely exercised. The common law courts have an undisputed jurisdiction over public nuisances, by indictment; and a court of equity ought not to interfere in a case of a misdemeanor, when the object sought can as well be attained in the ordinary tribunals. The injunction is a preventive remedy. If the injury be already done, the writ can have no operation; for it cannot be applied correctively so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong. (*Attorney General v. New Jersey Railroad Co.*, 2 Green's C. R. 136.)

9. In the case last cited, which was an information filed in behalf of the state against the defendants, in respect to

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a bridge across the Passaic, seriously obstructing navigation, Chancellor VROOM said: "I cannot avoid the conclusion that the nuisance complained of in the information, and which it appears to be the object of the relators either to prevent or abate, is already there. The thing is done; and the application to this court, if not too late, would be unavailing even if granted." He adds: "The relators insist that they have made the application as soon as practicable; that they confided in the agreement of the company as to the width of the draw, and were deceived. Admitting this to be all true, it is not perceived that the case is varied. If the nuisance be erected before the party has time to prevent it, the only remedy is to have it abated; and whether it be accomplished by the deception of the party or by other means, the province of the court remains the same." (2 Green's C. R. 141, 2.)

VII. But it is a fatal objection on appeal, that on the facts found the relief demanded was not matter of legal right; and this court will not review the exercise by the court below of its discretion, in refusing its aid by injunction, and leaving the plaintiffs to their remedy at law. (*City of Georgetown v. Alexandria Canal Company*, 12 Peters, 92; *Hart v. Mayor of Albany*, 9 Wendell, 572, 585; *Mohawk Bridge Co. v. Utica and Schenectady Railroad Co.*, 6 Paige, 555.)

MULLIN, J. The 6th section of plaintiff's charter, which prohibited the erection of a bridge within a mile of the plaintiff's bridge, having been repealed, the plaintiff stands in precisely the same position in reference to the defendants' bridge, that they would have done if no such prohibition had ever been contained in their charter. The right of the legislature to thus alter and modify the plaintiff's charter cannot be questioned.

Since the case of *The Charles River Bridge v. The Warren Bridge* (11 Peters, 420), it has been understood to

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be the law, that it is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right so to do is expressly prohibited by the first grant. (*Mohawk Bridge Company v. Utica & S. R. R. Company*, 6 Paige, 554; *Oswego Falls Bridge Company v. Fisk*, 1 Barb. Ch. R. 547.)

These propositions dispose of the principal questions in this case. But it is urged that the Mohawk river is a public stream, and that the defendants have no right to bridge it without authority of the legislature.

On the facts found in this case, the Mohawk river is not navigable, except to a very limited extent. Its capability for navigation has been very materially lessened within the last thirty years; hence the rules of law which applied to it then do not apply to it now.

But assuming that it is a public highway, and that the bridge is an obstruction to navigation, and therefore a public nuisance, yet no one has the right to abate it, or sustain an action for damages occasioned by the erection, unless he has himself sustained some damages not sustained by the rest of the community. (*Pierce v. Dart*, 7 Cowen, 609; *Lansting v. Smith*, 8 Cowen, 146; 9 Wend. 315; 6 Hill, 292; 3 B. & C. 556; 4 M. & S. 101; 19 John. 223; 37 Barb. 301.)

If the plaintiff's business was navigating the river, or if the new bridge endangered the safety of the plaintiff's bridge, then a right of action to restrain the erection, or for damages might be maintained, depending on the nature of the injury done or apprehended.

But because a bridge over a navigable stream may be a nuisance to those navigating it, it does not follow that it is a nuisance as to others who do not navigate it.

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The plaintiff having no exclusive grant of the right to maintain their bridge and take toll, it follows that every other bridge built over the stream which does not impede navigation, is lawfully erected and is not a public nuisance, and no action for damages will lie for its erection. If it does impede or impair navigation, it is a nuisance as to those navigating, but not to any others. The rights of the plaintiff are not, in contemplation of the law, injured by the new bridge, and hence they are not entitled to either an injunction or damages.

But it is said the defendants could not legally erect their bridge without authority from the legislature, and hence any person injured may resist its erection, or recover damages therefor. There are three cases in which authority from the legislature is necessary to erect a bridge over a stream. One is when the stream is navigable; 2d, when the state owns the bed of the stream; and 3d, when the right to take toll is desired.

It was decided by the court of errors in *The Canal Appraisers v. The People* (17 Wend. 571), that the bed of the Mohawk belonged to the state, and of course the defendants have no right to use the property of the state for their own benefit, without its consent. But I do not understand what right the plaintiffs have to complain of this appropriation of the bed of the stream, while the state officers make no objection to it.

I am free to say that I would be glad to see the old common law restored, which denied to the legislature the power to take away or impair a franchise granted by it; but the law is settled the other way, and we must conform to it. If the common law principle was restored, however, it would be no protection to owners of franchises, as under the power reserved by the legislature to amend or repeal its acts, the same result can be attained.

The judgment must be affirmed, with costs.

All the judges concurring, judgment affirmed.

Statement of case.

LOIS STOVER, Administratrix, and DANIEL FISH, Administrator, &c., v. DAVID H. FLACK.

By a verbal agreement between S. and F., it was agreed that S. should subscribe for \$1,000 of the capital stock of a manufacturing corporation, one-half of which should belong to each; that S. should hold the same on joint account, and receive the dividends thereon, F. to pay the interest annually on \$500, one-half the amount paid; that when S. should want the \$500 he was to notify F.; and if F. did not pay, S. should sell the stock, and F. would pay the difference between the sum received on such sale and the par value of the stock. S. accordingly subscribed for \$1,000 of the stock, in his own name, and paid therefor. It was a part of the bargain that the agreement should be put in writing, but it never was. A few years later the company became insolvent, and the stockholders being called on to pay an amount of debts equal to the stock held by them, S. paid \$1,000.

Held, 1. That the company having become insolvent, and its stock worthless, S. was not bound to sell it; and F. was clearly liable for one-half the price paid for the stock.

2. That S., being the nominal owner of the whole stock, was liable to pay \$1,000 in satisfaction of the debts of the company, and was not bound to wait until he was sued, and judgment recovered, before he paid; and that having paid \$500 on that account, which F. was equitably bound to pay, he could recover it back from F.
3. That the statutory exemption of executors, guardians, and others, trustees of an express trust, from liability for the debts of a corporation in which they hold stock in their fiduciary capacity, does not reach such a case.
4. That although F. might have insisted on the performance of the condition that the agreement should be reduced to writing, it was competent for him to waive it, by recognizing his liability on the contract, although it had never been reduced to writing and signed.
5. That F.'s liability for the \$500 paid by S. on account of debts, did not accrue until the stock was paid by S.; and that the statute of limitations did not begin to run until such payment was made.

THE facts in the case, which seem to have been established by the verdict of the jury are: That in 1852 a corporation was organized under the general act of 1848, (Laws of 1848, chap. 40,) called the Diamond Mills Manufacturing Company. That the plaintiff's intestate, Peter

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Stover, took and subscribed towards the capital stock thereof, ten shares, of the nominal or par value of one thousand dollars. That said stock was taken under an arrangement made with the defendant previous to the subscribing for and taking the same, that the plaintiff's intestate should subscribe for and take the stock, and pay for the same, on joint account. That the intestate should hold the stock, and that the defendant should pay him semi-annually the interest on one-half of the purchase money, and that the defendant should be entitled to all the dividends which the intestate might receive on that portion of the stock belonging to the defendant. It was further understood that if Stover, the plaintiff's intestate, desired to realize the money advanced for the defendant in the purchase of the stock, he might go into the market and sell the same, after giving the defendant notice; and the defendant was then to have the right to pay the money advanced and take the stock; and if the stock sold for less than par, the defendant was to pay the deficiency, and if it sold for more than par, he was to have the surplus. At the time this arrangement was entered into, it was understood that the parties were thereafter to meet and have it reduced to writing. This was never done, Stover having died soon after the arrangement was entered into. Stover, in execution of this agreement, subscribed for and took the stock, and agreed to pay \$1,000 therefor. Such payment was made, by the company purchasing flax of Stover, and on the 23d of March, 1853, a settlement was made between the plaintiffs and the company, at which time the company had received \$1,272.82 in flax, and after deducting the amount of Stover's subscription for the stock, \$1,000, the company paid to the plaintiffs the balance. It is stated in the case that the amount subscribed by Stover for the stock was proved to have been paid by his estate, and that the company became insolvent. It was also proved on the trial that on the 29th of September, 1856, a judgment was

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recovered against the company for \$7,992.57, upon which an execution was issued, and the same was returned unsatisfied. That a circular was issued by the officers of the company to its stockholders, showing the company insolvent exceeding \$20,000, and that all its estate, real and personal, had been sold, and requiring each stockholder to pay upon the outstanding debts of the company a sum equal to the amount of their respective subscriptions. That on the 28th of February, 1859, the plaintiffs, as the representatives of said Peter Stover, paid the further sum of \$1,000 towards the discharge of the debts of the company, pursuant to said circular and its requirements. Verdict for the plaintiffs for \$500 paid for the defendant's stock on the 23d of March, 1853, and interest thereon from that day, and for the \$500 paid on the 28th of February, 1859, on account of the debts of the company, and interest thereon from that day, making \$1,374.32. The defendant moved for a new trial, on the judge's minutes, which was denied, and the judgment was affirmed at the general term. This action was commenced on the 22d of March, 1859.

W. A. Beach, for the appellant.

John K. Porter, for the respondent.

DAVIES, J. One ground of defense interposed is the statute of limitations, and that has no application, except to the payment of the stock. It is contended, on the part of the defendant, that such payment was made by Stover in his lifetime by the delivery of the flax, and that such purchase of the flax by the company from Stover, produced an indebtedness on his part to the company for the stock. But it is to be borne in mind that Bradshaw, the treasurer of the company, testified that in fact such application of the mutual indebtedness was not made until the 23d day

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of March, 1859, when a settlement of the indebtedness of the company to Stover for the flax purchased, and his indebtedness to it for the stock, was made between the company and the plaintiffs as the representatives of Stover, and a balance being found due to the plaintiffs, the same was paid to them. But a conclusive answer to this view is found in the statement of the case, that this stock was paid for by the estate of Stover. This necessarily implies that it was not paid for by Stover in his lifetime, but by his representatives after his death, and there is no ground for any suggestion that they paid for it at any other time, or in any other manner than by the adjustment and settlement of accounts on the 23d of March, 1853, as detailed by Bradshaw. The defendant's liability did not accrue until the stock was paid for by Stover, or his representatives; and the statute consequently did not commence to run until such payment. It being made as we have seen, on the 23d of March, 1853, and this action having been commenced on the 22d of March, 1859, this ground of defense has entirely failed. Neither does the statute of frauds interpose any difficulty in the way of the plaintiff's recovery. He did not become a purchaser of the stock from their intestate. The authority given by the defendant was, that Stover should subscribe, take and pay for the stock in his, Stover's name, and that the defendant was to own the one-half part thereof. This arrangement constituted Stover his agent for those purposes, and the law implies a promise on his part to repay to Stover whatever sum he should advance and pay for the defendant's stock. Although the stock stood in the name of Stover, it became and was the defendant's stock. By virtue of this arrangement he became a stockholder in the company, and as such, liable to contribute and pay towards the discharge of the debts of the company, an amount equal to the amount of the stock so taken and owned by him. (*Burr v. Wilcox*, 22 N. Y. 551.) The money paid for the stock was so much

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money paid, laid out and expended for the defendant, and at his request. The defendant was not entitled to a transfer of the stock until payment of the amount paid therefor. If he wished to terminate his liability under the arrangement proven, it was his duty to have required the plaintiffs to sell the stock, and if there was any deficiency, to pay the same. From the facts testified to on the trial, it is quite apparent that the defendant was willing to let the stock remain with the plaintiffs under the arrangement made with their intestate. Without any call from the defendant, no duty was imposed on them to sell the stock, and it being shown on the trial that the same was worthless and of no value, they were not precluded from calling upon the defendant for payment, without making such sale. It would have been an idle ceremony, and in no manner could have tended to the benefit or advantage of the defendant. This reservation of the right to sell and charge the defendant with the deficiency, was made for the benefit of Stover, to secure him for the moneys advanced, and not as a condition of the defendant's liability. It was a cumulative remedy to ensure a reimbursement to him of the money advanced for the defendant, and did not in any sense, impair his right to call upon the defendant for repayment. We must take the whole agreement together; and by its terms we find that the defendant expressly promised to pay to the deceased the cost of over one-half of the stock taken by him. The agreement actually made, and in compliance with the terms of which the deceased subscribed for the stock, and incurred the liabilities of a stockholder, was not abrogated, or rendered ineffectual by reason of the parties thereto not having subsequently reduced the same to writing, as was contemplated to be done, at the time the same was entered into. We have seen that it was not essential to its validity that it should have been in writing, and the omission, or the unwillingness of the party to reduce the same to writing, did

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not terminate the obligations, which the agreement actually made created.

Stover was liable to the extent of the stock standing in his name, for the debts of the company. The creditors of the company under the authority of *Burr v. Wilcox (supra)*, could also have compelled the defendant to contribute to the amount of stock actually owned by him, although standing in Stover's name. No question appears to have been made on the trial, that the company was insolvent, and that the amount held by each stockholder was necessary to be contributed for the payment of its debts. The payment was made by the agent on account of his principal, and no point was made on the trial, that the defendant was not liable to reimburse the same, if he was adjudged to be the owner of the stock purchased under the arrangement proven. We think clearly he was, and that he was legally bound, not only to pay the sum advanced in payment of the stock, but also the amount paid by the plaintiffs to discharge the statute liability, created in favor of the creditors of the company.

We arrive at the conclusion, therefore, that the judgment should be affirmed.

MULLIN J. The agreement, to enforce which this action was brought, seems to have been that the testator should subscribe for \$1,000 of the capital stock of the Diamond Mills Manufacturing Company, one-half of which should belong to the defendant, the testator to hold the same and receive the dividends thereon, the defendant to pay the interest annually on the \$500, and when the intestate wanted the \$500 he was to notify the defendant, and if he did not pay, the intestate should sell the same, and the defendant would pay the difference between the sum received on such sale and the par value of the stock.

A few years after the intestate subscribed for the stock, the company became insolvent, and the stockholders were

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called on to pay an amount equal to the stock held by them to pay the debts of the company, and the intestate paid \$1,000, and \$500 of that sum is also claimed in this suit. It was a part of the bargain that the agreement should be put in writing, but it never was.

By the contract the intestate paid for the defendant, and at his request, \$500, which was to be repaid by the defendant. One-half of the stock subscribed for became and was the property of the defendant, although it stood in the name of the intestate. It was tendered to the defendant before suit brought, and thus the liability of the defendant perfected, so far as the ownership of the stock was concerned.

By the contract the intestate was bound to sell the stock, and in that way reimburse himself so much of the amount paid as the stock would bring on the sale. No sale was made, and hence it is claimed a condition precedent to a recovery in this case has not been performed.

But it clearly appears that the company had become insolvent, and its stock utterly worthless; there was nothing to sell. The defendant was clearly liable for one-half the amount paid for the stock.

The intestate, being the nominal owner of the whole stock, was liable to the company, or the creditors, to pay \$1,000 in satisfaction of the debts of the company. On the facts proved, there is no reason to doubt the power of the creditors to enforce the payment of this sum; and that being so, the intestate was not bound to wait until he was sued and judgment recovered, before he paid.

But it is said that the intestate was a trustee of the defendant's share of the stock, and hence not liable to be sued for it. Neither the company nor its creditors had any notice of any trust, and whether the intestate might have paid his own half and on informing the company or creditors of the manner in which he held the defendant's share, have given it or them a right of action against the defend-

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ant, is not very important. While it stood in the intestate's name he was liable for the whole; and he has paid \$500 for the defendant's benefit, which the defendant was equitably bound to pay.

It is just and right that executors, administrators, guardians of minors, and others, trustees of express trusts, should not be liable for debts of a corporation in which they hold stock in their fiduciary capacity. But there is no reason why a person holding stock as the intestate held that belonging to the defendant, should be exempt. The statute exemption does not reach the case.

It is said the contract as to the stock was never binding because by its terms the agreement was to be put in writing, and it was not. Conceding that the defendant might have insisted on the performance of this condition, it was competent for him to waive it; and he seems to have repeatedly recognized his liability on the contract, although it had never been reduced to writing and signed.

After a careful consideration of all the points raised by the defendant's counsel, I can discover no grounds on which the judgment can be reversed. It is therefore affirmed, with costs.

JOHNSON, J., was in favor of a reversal. All the rest of the judges being for affirmance, judgment affirmed.

Statement of case.

THE PEOPLE *ex rel.* NATHANIEL HUNTING v. THE COMMISSIONERS OF HIGHWAYS OF EAST HAMPTON.

A *certiorari* does not lie to an inferior tribunal, except to remove proceedings which remain before it.

In order to procure a reversal of an order of commissioners of highways, ordering the removal of fences as being an encroachment in a highway, on *certiorari*, it is necessary that the order should be brought up and made a part of the record.

The order cannot be brought up on a *certiorari* directed to the jury which determined the question as to the encroachment; they having no custody of the order, or power to make a return of it.

The jury are no longer a legal body, after their verdict or finding is signed and they have separated. Hence a return, signed by one of their number, several months afterwards, is no return of the jury as a body or tribunal. In such a proceeding there is no such officer as foreman, authorized to represent the panel of jurors, and to act for them.

Where a *certiorari* is directed to the jurors, the commissioners of highways cannot become parties by appearing voluntarily and defending their proceedings as commissioners.

The office of the writ of *certiorari* is merely to bring up the record of the proceedings, to enable the supreme court to determine whether the inferior court has proceeded within its jurisdiction, and not to correct mere errors in the course of proceedings.

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Appeal from a judgment of the Supreme Court in the second district, affirming the proceedings of the defendants for the removal of obstructions of a highway in said town.

THE case does not show what steps had been taken by the defendants as highway commissioners, except what appears in the return of one of the jurors to the *certiorari*. The *certiorari* was issued out of the supreme court, directed to "Edward T. Conklin," and five other persons, naming them "jurors, greeting;" and recited that the court "being willing for certain causes to be certified of the trial before you, as a jury summoned and empaneled under and by virtue of a precept issued by Henry B. Tuthill, Esq., a justice of the peace, on the application of the commissioners of highways of the town of East Hampton, returna-

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ble on the 19th of August, 1859, to determine whether Nathaniel Huntting had encroached upon the highway as charged against him in an order of the said commissioners, dated June 11, 1859, as also all the pleadings and proceedings remaining before you on the said proceeding between the parties aforesaid." The writ then commanded them to certify without delay "the said trial, with a copy of the certificate made and signed by you on the said trial, and the pleadings and proceedings, and all other things touching the same, as fully and amply as the same remain before you," &c. To this writ, Edward T. Conklin who describes himself as "foreman of the jurors in the annexed writ mentioned," makes and signs a return, in which he states what took place upon the trial before them. Setting forth the evidence offered by the commissioners, and the objection to it by the relator, and his offer to show that the record, produced by the commissioners as evidence of the highway, was invalid, and that the public had no right of way under it, "and therefore, the fence erected was not an encroachment on a highway." It then recites the objection to the offer by the counsel for the commissioners, and the decision of the jury upon the offer "that they could not pass upon the validity of the record, but only on the fact of the erection of the fence on the alleged highway, the extent, by whom and when erected." To this is annexed a copy of the certificate made and signed by the jurors at the close of the trial, finding and certifying the encroachment, and specifying the particulars thereof in due form. On the 5th of October, 1860, the relator procured an order for a further return by the jurors. To this order the said Conklin as "foreman," makes an additional return substantially like the first, setting out somewhat more fully the relator's offer, and the grounds and reasons assigned by his counsel, and also the answer of the counsel for the commissioners, and his objections, and their decision that the evidence offered was irrelevant, and that

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they would not hear it, or any of it, "to which decision the relator's counsel excepted." To this amended or further return is annexed a copy of the order of the commissioners of said town, dated the 1st of April, 1833, which was read in evidence before them from the town records. This purports to be an order upon a proceeding of the commissioners under the act regulating highways in Suffolk county, "to survey, stake out, and record such width of highway as appears to be necessary for public convenience." This order describes the width and course of the road in question by a particular description. It is then stated, as part of the case, that at the argument before the supreme court, in order to obviate a postponement of the case, to enable the relator's counsel to obtain a further return, it was admitted by the defendants' counsel as a fact "that the jury did not find that any of the land south-easterly of the fence was a highway;" that they refused to entertain the question whether it was a highway or not; and that this fact should be considered by the court as part of the return made by the jurors. The proceeding to remove the encroachment, was under the act of February 23d, 1830, regulating highways in the counties of Suffolk, Queens and Kings. The order of the commissioners of highways on the subject of the encroachment is not returned, and does not appear in any part of the case. The supreme court affirmed the proceedings, and the relator appealed to this court.

Miller and Tuthill, for the appellants.

W. P. Buffett, for the respondents.

JOHNSON, J. The proceedings to remove encroachments upon a highway in the counties of Suffolk, Queens and Kings, under the act of 23d February, 1830, applying to those counties exclusively, are identical with the proceed-

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ings for the same purpose in other parts of the state, under the revised statutes, except that in the first named act only six jurors out of the twelve summoned are drawn to serve as the jury and try the question.

The object which the relator sought to accomplish by the writ of certiorari, and proceedings under it, was to procure a reversal of the order of the commissioners of highways, ordering the removal of the relator's fences, as an encroachment, and the subsequent proceedings under that order. In order to do this, it was necessary that that order should have been brought up and made part of the record. That order lay at the foundation of all the proceedings, and unless brought up by the return, the entire end and aim of the certiorari must necessarily fail. Of course this order could not be brought up on a certiorari directed to the jury. They had no custody of it. It did not belong to them or remain with them, and they could make no return of it. It is quite apparent that the jury is not the body to which a certiorari should be directed in such a case. They merely come to try a disputed question of fact between the commissioners and the occupant of the land, upon evidence produced before them by either party litigant, and certify their finding. The certificate is to be filed in the town clerk's office, and that is an end of their power and authority in the matter. No part of the record belongs to them, or remains with them, and they can return nothing other than what has been returned here, a mere narrative of the proceedings before them. This is no record, in any legal sense, of the proceedings by which the relator's fence was determined to be an encroachment. A certiorari does not lie to an inferior tribunal except to remove proceedings which remain before it. (*The People v. Supervisors of Queens*, 1 Hill, 195.) The writ in question did not properly bring up this certificate of the finding of the jury, even. They were no longer a legal body, after their verdict or finding was signed, and they

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had separated, but mere individuals. All their official functions had ceased entirely. And a return signed by one of their number, several months afterwards, was no return of the jury as a body or tribunal. In such a proceeding there is no such officer as foreman, authorized to represent the panel of jurors, and act for them. Where the writ of certiorari is improperly directed, or returned, nothing can be removed by it. (*Bac. Ab. Certiorari, I. Peck v. Foot*, 4 How. Prac. Rep. 425.) The writ having been erroneously directed, and the return a nullity, as most obviously it is, the supreme court acquired no jurisdiction over the subject matter. There was nothing before it to reverse or affirm. The defendants seem to have appeared and defended their proceedings as commissioners, though the writ was not directed to them, nor were they required by it to appear or answer. It is difficult to see how they could become parties. But no question of this kind seems to have been raised, on either side, and the proceedings were affirmed in favor of the defendants. The relator has evidently mistaken wholly the office of this writ, which is merely to bring up the record of the proceedings, to enable the supreme court to determine whether the inferior tribunal has proceeded within its jurisdiction, and not to correct mere errors in the course of the proceeding. Here the object seems to have been to bring into review the alleged erroneous rulings of the jury in receiving or rejecting evidence offered on the hearing before them, as though it were a bill of exceptions. Such questions do not arise and can not be reviewed on certiorari. (*Birdsall v. Phillips*, 17 Wendell, 464.) It is evident enough that both the defendants and the jury had jurisdiction in the matter before them. But the proceedings not being before the supreme court, there was nothing for them to affirm. Their judgment should have been a dismissal of the writ, or that the relator take nothing by it.

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The judgment of the supreme court must, therefore, be reversed, and the case remitted to that court, with directions to dismiss the proceedings, but without costs to either party.

All the judges concurring, judgment accordingly.

AARON L. PHELPS v. WILLIAM WAIT and NATHAN WAIT.

A joint action will lie against principal and agent, for a personal injury caused by the negligence of the latter (in the absence of the former), in the course of his employment.

Appeal from a judgment of the Supreme Court, entered upon the report of referees, in favor of the plaintiff, for three hundred and seventy-five dollars.

THE action was brought against father and son, standing in the relation of master and servant, to recover damages for personal injuries caused by the negligence of the son, while driving the horses of his father.

E. F. Bullard, for the appellants.

John K. Porter, for the respondent.

HOGEBROOM, J. This action is brought to recover damages for personal injuries sustained by reason of negligence on the part of the defendants. The plaintiff was crossing a street in the village of Waterford. The defendant, Nathan Wait, was driving a pair of horses attached to a wagon, which came in collision with the plaintiff, prostrated him and passed over his body. The horses and wagon belonged to the defendant, William Wait, in whose employment, and whose son the other defendant was. Three questions are made in the case:

1. Was the defendant Nathan guilty of negligence?
2. Was the plaintiff also guilty of negligence?
3. Will a joint action lie against the principal and the agent, for the negligence of the latter (in the absence of the former), in the course of his employment?

On the first two questions, very little doubt can arise, and they have been determined as questions of fact in the plaintiff's favor by the referees who tried the cause. The

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plaintiff was crossing a public street in Waterford with ordinary care, and with no reason to apprehend danger. When so crossing there was at first no vehicle in sight with which there could be any prospect of collision. The defendant engaged in an altercation with a drunken man, and his attention being engrossed by him, he drove suddenly and rapidly out of the yard, and run over plaintiff. It was a case of negligence on the part of defendant, and of no want of proper care on the part of the plaintiff. The cases of *Steves v. Oswego & Syracuse Railroad Company* (18 N. Y. 422), and *Johnson v. Hudson Railroad Company* (20 N. Y. 65), present no facts or rules of law which interfere with the plaintiff's right to recover in this case.

The case was retained for examination principally upon the other point—the supposed misjoinder of parties—and to enable the defendants' counsel to supply a reference to authorities showing that in analogous cases principal and agent could not be sued together. The current of authority is certainly the other way, and in favor of the right to join these parties. And I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine. The question was carefully considered by the supreme court in the leading case of *Wright v. Wilcox* (19 Wendell, 343), and has since been followed in several other cases. (*Montfort v. Hughes*, 3 E. D. Smith's Rep. 591; *Suydam v. Moore*, 8 Barbour, 358; *Hewett v. Swift*, 10 Am. Law Reg. 505.)

The defendants' counsel refers to a manuscript case in the supreme court, in the 4th judicial district, *Vernam v. Gibson & Farnham*, which is supposed to hold a contrary rule; but we have not been favored with the opinion of the court, and unless it is based upon some other principle than those discussed in the cases already adverted to, it must be regarded as overborne by the weight of authority. The judgment should be affirmed.

All the judges concurring, judgment affirmed.

Statement of case.

ANDREW McCOTTER v. JOHN JAY and others.

Where foreclosure proceedings are entirely regular, and free from fraud, they can not be disturbed, or set aside, without some legal reason.

Want of knowledge of the time and place of sale, on the part of one who was a party to the foreclosure suit, and was therefore bound to use due diligence in obtaining information of the sale in order to protect his rights, affords no sufficient reason.

If a party is equitably entitled to relief against foreclosure proceedings, it is by way of *motion*, addressed to the favor or discretion of the court, to open the biddings at the sale.

He can claim no legal or absolute right; and if permitted to come in at all, can be allowed to do so only on terms.

Those terms can not properly be adjusted in an action brought to set aside the sale as unfairly and inequitably conducted.

THIS action was brought to set aside a sale of mortgaged premises as unfairly and inequitably conducted on the part of the defendant, Jay; also two deeds of conveyance of the mortgaged premises to two others of the defendants, Weeks and Hoff; and also a mortgage executed by the last named persons to the other defendant, Hulse, after the purchase under the mortgage sale. The mortgaged premises were sold under legal proceedings regularly conducted, to foreclose a mortgage executed by one Michael C. Coss to the plaintiff, which mortgage the plaintiff transferred to the Mechanics' Fire Insurance Company, and on such transfer guaranteed the payment thereof. Jay was subsequently appointed receiver of the latter company, and as such receiver foreclosed the mortgage. His attorney purchased the premises at the foreclosure sale, and assigned his bid to the defendant, Weeks, who took the sheriff's deed on the foreclosure, and afterwards sold one-half of the property to the defendant, Hoff. The plaintiff was not aware of the foreclosure sale, and claims that it was wrongfully and inequitably concealed from him by the attorney of the receiver. There was, however, no evidence

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of fraud, and so the judge found as a question of fact, and also of law, at the trial, and dismissed the complaint, with costs. On appeal his decision was affirmed at the general term. The plaintiff then appealed to this court.

George Miller, for the appellant.

W. P. Buffett, for the respondents.

HOGBOOM, J. There appear to be several insuperable difficulties in the way of the plaintiff.

1. The foreclosure proceedings were entirely regular and free from fraud. They cannot, therefore, be disturbed or set aside without some legal reason.

2. No sufficient reason appears in the case. The plaintiff's want of knowledge of the time and place of the sale is entirely attributable to his own negligence. He was a party to the foreclosure suit, and was bound to due diligence in obtaining information of the sale, in order to protect his rights.

3. He does not allege that he was misled or legally surprised.

4. If equitably entitled to relief, it was by way of motion addressed to the favor or discretion of the court, to open the biddings at the sale. He can claim no legal or absolute right, and if permitted to come in at all, can be allowed to do so only on terms.

5. These terms cannot properly be adjusted in this action. The complaint is not framed with such an aspect. The plaintiff has no legal and proper standing in court. He has no lien upon the premises, and no equitable interest therein. He shows no fraud, and cannot therefore ask to set aside the sale as a matter of right, even if as a mere guarantor of the debt he would be permitted to file a bill for such a purpose. He makes no title to relief, even upon motion, inasmuch as he is plainly guilty of laches,

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and fails otherwise to present sufficient grounds for the equitable interference of the court.

The judgment should be affirmed, with costs.

All the judges concurring, judgment affirmed.

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HENRY E. HOOKER v. EAGLE BANK OF ROCHESTER.

It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment.

For many purposes the officers and agents of the corporation may employ persons to perform services for it; and such employment, being within the scope of the agent or officer's duty, binds the corporation.

In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors and they receive the benefit of such service, without objection, the corporation is liable upon an implied assumpsit.

In equity, a parol assignment of a claim or demand enables the assignee to sue in his own name.

Under the code an assignment, valid as an equitable assignment, is equally valid at law.

In April, 1854, the defendant owned a lot of land in the city of Rochester, the buildings on which had been destroyed by fire, and it intended to erect on said premises a new building in a part of which its banking house was to be located. Kauffman & Bissel were architects, in Rochester, at the same time; and Bissel, one of said firm, had entered into a contract with said defendant for the purchase of a part of said premises, on which the defendant was to erect a new building, but this agreement was rescinded before the transactions hereinafter mentioned. K. & B. prepared plans and specifications for the new building, under a contract, as is alleged in the complaint, with the defendant to furnish the same and superintend the work, for the sum of \$1,000. The excavation of the cellar and construction of a sewer on said premises were let to one Potter, who had entered into a contract for said work, and he performed work according to the plans and specifications furnished by K. & B., and was paid upon estimates made by them.

In the spring of 1855 the bank sold the said premises to one Chappel, who assumed the contract with said Pot-

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ter, and agreed to pay a small sum to one Austin, an architect, for work done in reference to said building, and also to pay to K. & B. a sum for like services not then liquidated, not exceeding, however, \$50. Chappel dismissed K. & B. and employed another architect, although they were, as they allege, ready and willing to go on with the work. The complaint contained two causes of action; one on a special contract to pay \$1,000 for the services to be rendered by K. & B.; the other on a *quantum meruit*. The assignment to the plaintiff from K. & B. was not in writing, and evidence of the assignment was objected to on that ground.

On the trial evidence was given on the part of the plaintiff, who was assignee of the demand from K. & B., tending to prove an agreement by the defendant, through its president and two other officers, to employ and pay K. & B. for preparing plans, &c., \$1,000; and on the part of the bank, tending to show that no such agreement was made. It was shown that at the time K. & B. were dismissed from the work one-half of the work was done. The defendant moved for a non-suit on the grounds:

- 1st. That no cause of action had been proved.
- 2d. That neither of the issues had been proved.
- 3d. The assignment to the plaintiff was not in writing, and therefore was invalid.

The motion was denied and the defendant's counsel excepted. The defendant's counsel requested the court to charge the jury that the plaintiff could not recover unless he proved an express contract between K. & B. and the defendant, and that such contract could be made only by the directors acting as a body, or by some person to whom they had delegated a power to make a contract. That the defendants could not be charged on an implied contract. That there was no evidence that Cheney or Bacon, two of the directors, jointly or individually, were authorized by the defendant to make any contract with K. & B., and

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that their acts and admissions are insufficient to charge the defendant.

The court charged in substance that the plaintiff could not recover on the special contract, unless he proved an express contract between K. & B. and the bank to do the work at the price named. That the defendant could only contract by resolution of its board of directors, or by its officers acting within the scope of their authority. But that, if no express contract was proved to employ K. & B. and pay them the \$1,000, a contract might be implied from the request of the bank, or its officers, to K. & B. to do the work. And upon the performance of services in pursuance of such request, and the subsequent ratification thereof by the bank, the bank was bound to pay so much as the services were reasonably worth.

The defendant's counsel excepted to that part of the charge in which the jury were told that a contract might be implied, and to the refusal to charge as requested. The jury found for the plaintiff \$500, for which sum judgment was rendered, and the same was affirmed at a general term of the supreme court sitting in the seventh district, and the defendant appealed.

— — —, for the appellant.

T. C. Montgomery, for the respondent.

MULLIN, J. Proof was given, on the trial, tending to prove an express contract by the defendant to employ Kauffman & Bissel as architects to make plans, &c., for the new building, and to pay them therefor the sum of \$1,000. The jury, by finding for the plaintiff \$500 only, must have found there was no express promise to pay K. & B. \$1,000, but they have found an agreement to employ them; that they, K. & B., have performed services for the defendant, and that such services are reasonably worth \$500. It is

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not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment. For many purposes the officers and agents of the corporation may employ persons to perform services for it, and such employment, being within the scope of the agent or officers' duty, binds the corporation. In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors and they receive the benefit of such service without objection, the corporation is liable upon an implied assumpsit. (*Danforth v. Schoharie Turnpike Co.* 12 J. R. 227; *Dunn v. Rector of St. Andrews*, 14 id. 118; *Long Island Railroad Co. v. Marquand*, 6 Legal Obs. 160; *Fister v. LaRue*, 15 Barb. 323; 7 Cowen, 540; 9 Paige, 496; 17 N. Y. 449; 22 Wend. 348; 20 Wend. 91; 4 Cow. 645; *Angel & Ames on Corp.* §§ 7, 8.) There was sufficient evidence to authorize the verdict.

Sundry objections were made to the evidence of the witness Potter, taken on commission. It appeared that he had entered into a contract with the defendant to build the foundation of the new building, and perform other work connected therewith; and, in his answers to some of the interrogatories, he spoke of the contract, and it was objected that the contract should have been produced. The interrogatories did not call for the terms of such contract, nor do they even mention a contract. The witness, in stating his connection with the building, spoke of his contract, but did not give, nor propose to give, the terms of it. There was no ground whatever for the objection, and it was properly overruled.

The same witness was asked whether he had seen plans and specifications made by K. & B. He replied that he had. The defendant's counsel objected that the papers should be produced, and this objection was overruled. The witness Bissel testified that the plans, &c., were left

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with some of the officers of the bank, and the architect employed after K. & B. were discharged used some of them. The judge might well presume the papers in the defendant's custody; and if so, the bringing of the suit was sufficient notice to produce them. These objections were properly overruled.

The defendant moved for a non-suit on several grounds, all of which are disposed of by the legal propositions above advanced, except one, and that is, that the assignment from K. & B. to the plaintiff, being without writing, was void.

A chose in action might at law be assigned without writing, so as to enable the assignee to enforce the debt or demand assigned in the name of the assignor, if there was a valuable consideration and a delivery of the thing assigned. (*Ford v. Stuart*, 19 J. R. 342; *Briggs v. Dorr*, 19 J. R. 95; *Prescott v. Hall*, 17 J. R. 284.) Such an assignment, in equity, enabled the assignee to sue in his own name. •

A book debt is a chose in action and assignable; (*Dix v. Cobb*, 4 Mass. 508;) and may, like any other chose in action, be assigned by parol. (*Jones v. Witter*, 13 Mass. 304; *Briggs v. Dorr*, id. 95, and cases cited; 2 Cases in Chancery, 7, 37; *Dunn v. Sell*, 15 Mass. 485.)

Under the code, an assignment valid as an equitable assignment is equally valid at law. (Code, § 111.)

The charge was right, and the judgment must therefore be affirmed, with costs.

All the judges concurring, judgment affirmed.

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CHARLES BUTLER, survivor, &c. v. DAVID COLDEN MURRAY
and others.

The master of a vessel is for most purposes the agent of the owner of the ship or cargo; but that agency does not extend to a sale of either, unless there is a necessity at the time for so doing.

As to the *degree* of the necessity which must be shown to have existed, in order to justify a sale of the ship or cargo.

In order to justify the sale of a cargo at an intermediate port, several things must concur: 1st. There must be a necessity for it arising from the nature or condition of the property, or from an inability to complete the voyage by the same ship, or to procure another. 2d. The captain must have acted in good faith. 3d. He must, if practicable, consult with the owner before selling.

Where there is a question for the jury, on the facts as to the necessity for a sale of the cargo, the court should submit the case to the jury, instead of ordering a verdict for the plaintiff.

And if the jury should believe from the testimony, that judging from the condition of the cargo at the port where sold, it could, if re-shipped by any vessel and sent to its port of destination within a reasonable time, be so damaged as to be practically valueless, the master in an action against him to recover the value, will be entitled to a verdict.

And where the master of a vessel conveying a cargo of hides, found the cargo at an intermediate port, to be in a bad and perishing condition, and summoned three respectable men, dealers in, and shippers of hides, to examine the cargo, and declare what it was proper for him to do, under the circumstances, who advised a sale, and the hides were sold accordingly. *Held*, that although this advice was not conclusive, yet that it should be taken into consideration by the jury in determining the question as to the necessity of a sale, and was entitled to very considerable weight.

Appeal from the Superior Court of the city of New York.

THIS action was commenced by N. Rogers & Co., against D. Colden Murray and others, owners of the schooner *Pedee*, to recover the value of a quantity of hides shipped on board the *Pedee*, at Aspinwall, consigned to the plaintiffs at New York. The defendants set up, that the vessel having been forced to put into the port of Carthage, in distress, the hides were discovered to be in a perishing condition, and that the master, acting in good faith,

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and in the exercise of a sound discretion, to prevent further loss, had ordered them to be sold at auction; and that they were so sold; and that the defendants had tendered the proceeds to the plaintiffs, after deducting certain amounts due for general average and expenses. The issues came on to be tried before Justice SLOSSON, and a jury, on the 28th day of May, 1857, and a verdict was rendered for the defendants. The plaintiffs appealed to the general term, where the judgment was reversed and a new trial ordered, on the ground that the verdict was not only against evidence, but should have been for the plaintiffs. The cause was again tried before Justice SLOSSON and a jury, on the 8th day of February, 1859, and that judge charged the jury, that pursuant to the decision at general term, they must find for the plaintiffs, and the only question for them to decide, was the amount of damages. The jury found a verdict for the plaintiffs for \$881.38. Judgment being entered, the defendants having taken exceptions to the charge, appealed to the general term, where the judgment was affirmed October 25th, 1859. From that judgment the defendants appealed to this court.

The facts substantially are that the schooner *Pedee*, belonging to the defendants, sailed from the port of Aspinwall for New York, *via* the port of St. Jago de Cuba, on the 6th day of July, 1855, having on board a cargo of hides and skins, old iron, copper, rigging and ivory nuts. The plaintiffs held a bill of lading for part (about one-half) of the hides and skins, the iron, copper and rigging shipped by A. M. Price & Co., and another bill of lading for the ivory nuts shipped by E. Duckworth & Co. The schooner was well manned and equipped. On the second day out from port, the first mate was taken sick with the Chagres fever, and within two or three days the master, Captain James Y. Carr, the second mate, and the rest of the crew, were taken down with the same disease. The two mates and one of the crew died. The master and the rest of the

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crew were unable, from sickness, to navigate the vessel, and for nearly sixty days she was almost entirely at the mercy of the wind and waves. About the 31st of July she was blown ashore near Darien on the coast of the Spanish Main, and considerably injured, losing her false keel, spars, &c. On the 1st of September she got into the port of Carthagena, distant some five hundred miles from Aspinwall, in distress. Upon her arrival it was discovered that the hides and skins were overrun, and being eaten up and destroyed by worms and bugs, which attack hides in tropical climates. A survey of the hides was called by the master, acting under the advice of the United States Consul. This survey was made by three respectable American merchants, who declared and reported that the hides and skins were generally very much injured by worms, that a great portion of them were so much eaten up as to be almost valueless, and that in their opinion none of the hides and skins could be taken to New York, and that they ought to be sold "on account of whom it might concern, in order to save further loss." The master, acting under the survey and under the advice of the Consul, and having taken the opinions of respectable merchants engaged in the trade, and knowing the condition of the hides; considering them as perishing; that he was unable to take them into his own vessel as they would be utterly destroyed; and unable to transship them to be forwarded by another vessel, as they could not be transhipped unless they were first cleaned and dressed; and as he had no funds for this purpose, and had not necessary facilities for so doing, and had no skill or experience in such business, and as there was much doubt of the propriety of his attempting the experiment, he, after having the hides cleaned as well as he could, ordered them to be sold at public auction. Due and ample notice of the sale was given, and the hides and skins were sold by the government auctioneer at the Arsenal wharf at Carthagena, on the 27th day of October, 1855. After

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the sale a letter was received by Foster & Horner, at Carthage, from E. Duckworth, the shipper at Aspinwall of the ivory nuts consigned to the plaintiffs, and also a partner of A. M. Price, the shipper of the hides, expressing his satisfaction that the hides were to be sold, and requesting them to look after the hides, &c. The hides and skins of the plaintiffs brought \$344.66. The defendants having deducted general average on the entire shipment to the plaintiffs, including the ivory nuts, iron, &c., tendered the balance to the plaintiffs before action brought. The hides and skins were purchased by Messrs. Foster & Horner, American merchants at Carthage, and after being thoroughly beaten, cleaned, immersed in sea-water, &c., were shipped by the brig Abrasia to New York, and were there sold, February 2d, 1856, at private sale, for about nine hundred dollars, after deducting charges. The schooner Pedee was repaired, left Carthage on the 21st of November, 1855, and sailed to St. Jago de Cuba, and thence to New York, where she arrived March 3d, 1856.

John Sherwood, for the appellants.

I. The general rules of law applicable to this case are perfectly well settled that, in cases of necessity, the master is by law created the agent of all parties concerned—the owners of the cargo as well as of the vessel. His acts, done under these circumstances, in the exercise of a sound discretion, are binding upon all parties in interest. (*The Gratitude*, Sir Wm. Scott, 3 Rob. Ad., Phila. ed. 211—other editions 240; *Miston v. Lord*, 1 Blatch. C. C. R. 354.) That where the cargo is perishable and perishing, so that it will become worthless, it is the duty of the master, exercising in good faith a sound discretion, in the absence of instructions from the shipper, to sell the cargo, and the owners of the vessel will be discharged from all liability. (*The Gratitude*, *supra*; *Miston v. Lord*, *supra*; *The Ann*

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D. Richardson, 1 Blatch. C. C. R. 458; and, especially, *Smith v. Martin*, opinion of Chief Justice TILGHMAN, 6 Binney, 266.) See, also, 1 Arnold on Insurance, page 187, showing distinction between the English and American cases; that, by the American law, not only the right of selling perishable cargo is conceded, but the duty is enjoined upon the master. (See also *Jordan v. The Warren Ins. Co.*, 1 Story C. C. R. 352-3.) That though the cargo may have been delivered at its destination in specie, still, if it would have become worthless, it is the duty of the master to sell. (*Jordan v. Warren Ins. Co.*, *supra*; 2 Smith's Leading Cases, 695-6.) Nor need the necessity be actual in order to justify the master in making the sale. The necessity must be estimated and determined from all the facts then within his means of knowledge. This is enough, though subsequent events prove that the cargo might have arrived with safety at the port of destination. (1 Parsons on Contracts, 66, and cases cited; *The Barque Gentleman*, 1 Blatch. C. C. R. 201; *Smith v. Martin*, *sup.*; *Maas v. The Schooner Pedee*, *sup.*) A survey by competent surveyors is the most important element in determining the character of the emergency, and, especially, the good faith of the master. (*The Henry*, 1 Blatch. & Howland, 465.) The opinions of respectable, reliable merchants, engaged in business at Carthagera, who saw the hides and knew the circumstances of the case, to establish the good faith and proper exercise of discretion on the part of the master, are entitled to the greatest weight. (*Fenwick v. Bell*, 1 Car. & Kir. 312; 1 Phil. on Ev. 290.) The testimony relating to the sickness of the master and crew, on her voyage from Aspinwall to Carthagera, was proper to show the character of the emergency, the necessity that occasioned the injury to the vessel, and the necessity for seeking the port of Carthagera. And further, to show the distress that resulted in the loss for which the defendants seek to recover the proportion of general average. And

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so of the testimony in respect to the condition of the vessel and difficulties of the voyage before her arrival at Carthagena.

II. The questions then being, whether there was a necessity for the sale of the hides, according to the facts as they appeared at Carthagena, whether the master acted honestly and in good faith, and whether he exercised prudence and sound discretion in taking the course he did; the judge at the trial should have submitted those questions to the jury. The judge directed the jury to find for the plaintiffs, only leaving them to determine the question of the amount of damages. The defendants' exceptions to this ruling were well taken. These questions are questions of fact for the jury to determine. (*Smith v. Martin, supra.*) Questions of necessity, of negligence, of care and diligence, and of the prudence and discretion to be exercised by the master of the vessel, are questions to be submitted to a jury. (*Aymar v. Astor*, 6 Cow. 266; *Patrick v. Hallett*, 1 J. R. 241; *Moore v. Westervelt*, 21 N. Y. R. 103; *Bell v. Smith*, 2 J. R. 98; *Sherwood v. Ruggles*, 2 Sand. 58; *Child v. The Sun Mutual Insurance Company*, 3 Sand. 26; *Minturn v. Allen*, 3 Sand. 50—approved on appeal, 3 Selden, 220.) To admit a positive instruction to find for a particular party, is allowable only where the evidence leaves no reasonable doubt of the facts in issue. (*St. John v. The Mayor of New York*, 6 Duer, 315–17.) To warrant an unqualified direction at the trial in favor of one or the other party, the evidence must be undisputed, or the preponderance must be so strong as to admit of no reasonable doubt. (*Crawford v. Wilson*, 4 Barb. 504–18; *Rich v. Rich*, 16 Wend. 663.) Negligence is in all instances a question of fact, and it is only where a question of fact is entirely free from doubt, that the court has a right to apply the law without the action of the jury. (*Bernhardt v. Rensselaer & Saratoga Railroad Company*, 32 Barb. 165–9—approved in the court of appeals, 23 Howard Pr. 166.)

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To determine what a man of ordinary care and prudence would do under circumstances involving more or less conjecture, is a question which can only be settled by a jury. (Same case; *Harris v. The Northern Indiana R. R. Co.*, 20 N. Y. R. 232; *Mangam v. Brooklyn City R. R. Co.*, 36 Barb. 280; *Williams v. Vanderbilt*, 29 Barb. 504—affirmed on appeal December, 1863.) The evidence in this case is contradictory. 1st. As to the actual perishability of hides attacked by worms. 2d. As to the true condition of the hides at Carthagena. 3d. As to the true ability of the master to raise funds to cure, clean and tranship the hides.

III. If there is no contradiction upon these points, the jury should have been directed to find for the defendants. The evidence of what occurred at Carthagena would have authorized that direction, certainly, if the evidence of subsequent events had been disregarded. The court cannot, for the purpose of directing a verdict for the plaintiffs, assume that the defendants' witnesses are not to be believed. (*Merritt v. Lyon*, 3 Barb. 110.) The court below would not, unless they disbelieved most of the witnesses, or overlooked their testimony, have found facts which would authorize the direction given to the jury.

J. Edgar, for the respondents.

I. The master possessed no authority to sell the goods, on account of their perishable nature.

1. The possibility of the hides becoming valueless from bugs, was a danger inherent to their nature, and not a danger of the sea. It was a danger assumed by the owners of the hides when they were shipped, and foreseen by the master; and it was the duty of the master to preserve them as well as possible by the means within his reach, and deliver them in specie to the consignees according to the bill of lading. (*Elliott v. Russell*, 10 John. R. p. 1; *Kemp v. Coughtry*, 11 John. 107; *McArthur v. Sears*, 21

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Wend. 190; *Parsons v. Hardy*, 14 Wend. 215; *DeMott v. Laraway*, id. 225; *Gould v. Hill*, 2 Hill, 623; *Van Natta v. The Mutual Security Insurance Co.*, 2 Sand. S. C. R. 490; *Bark Gentleman*, 1 Olcott's Ad. R. 110; *Hazard's Administrator v. New England Mutual Ins. Co.*, 8 Peters (U. S.) Rep. 537.)

2. He could not be certain that they would prove a total loss to the owners, if carried further, and it was not within his province or duty to decide that the interest of the owners would be promoted by a sale at Carthagera. (See case of *Ann D. Richardson*, 1 Abbott's Admiralty Rep. 499, [506].)

3. Such a doctrine would give the master a wide field for speculating with his cargo, which it is his duty only to protect and transport.

II. But if the master could, in any event, be justified in selling the goods on account of their perishing condition, then the necessity for such a sale on that account must be proved to have been absolute; and if it afterwards appeared that no such absolute necessity did exist, then the master and owners of the vessel are liable for the goods so sold. In this case no such necessity did exist. (3 Kent, 7th ed. 222, 223; 13 Pickering, 543; 1 Abbott's Ad. Rep. 499, [306]; *Myers v. Baymore*, 10 Barr [Pa.] Rep. page 114.)

1. The fact that the hides, after the sale, arrived in New York in a tolerably good condition, considered with the reasons given by the master and surveyors for the sale, and the actual cost of cleaning, afford conclusive evidence that there had been no necessity for the sale.

2. The master might have sold a part of the hides, if absolutely necessary to raise funds to clean the balance, but he had no authority to sell the whole.

III. It was the duty of the master to have cleaned the hides and brought them to New York by the *Pedee*, or to have forwarded them, if possible, by some other vessel.

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He could have sent them to their place of destination by the *Abrasia*. (Abbott on Shipping [4th American ed.], p. 241 to 244; *Schieffelin v. New York Ins. Co.*, 9 John. p. 21, &c; *Treadwell v. Union Insurance Co.*, 6 Cowen, 270; *Palmer v. Lorillard*, 16 John. 348; *Parsons v. Hardy*, 14 Wend. 215; 3 Kent's Com. 213; *Saltus v. The Ocean Ins. Co.*, 12 J. R. 107.)

IV. If the master had re-shipped the hides in another vessel for New York, immediately upon or shortly after his arrival at Carthagera, they might have arrived here before the time they were actually sold at Carthagera; and the defendants have not shown, as they were bound to show (see 9 John. 28), that such reshipment could not have been made.

V. The owners of the vessel are liable for an error of judgment, as well as misconduct of the master, although he may have acted in good faith. (Angell on Com. Car., §§ 182, 185, 520; 3 Kent, 7th ed., 222, 223; *Purviance v. Argus*, 1 Dallas, 131, 184, 185.)

VI. The superior court, at general term, upon the first appeal, having decided that the verdict for the defendants at a former trial of this action was contrary to law and evidence (see 3 Bosworth, 357), and no new evidence being adduced upon the second trial, the judge was right in directing a verdict for the plaintiff, as a legal result of the facts proved, and leaving only the question of the amount of damage, less general average, &c., to the jury. The case was fairly submitted to the jury, as far as they had any province in the matter. Besides, there was no conflict of evidence, and no dispute about the facts of the case, except as to the amount of damage, and therefore the conclusion to be drawn from these facts was a question of law. (*Pratt v. Footé*, 5 Seld. 463.)

VII. If the judge had stated to the jury, at the second trial, the determination of the court at general term upon this first appeal, but had left it with them to find other-

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wise, it would have been error; and if the jury had then again found for the defendants, the court again, on appeal, would have ordered a third trial, as a new trial will always be ordered where the jury "manifestly disregard the determination of the court." The chance of such a delay in bringing the action to a conclusion was properly avoided by the direction of the judge to the jury at the second trial. But if the direction of the judge to the jury was erroneous, and this court see that the verdict was such as should have been found from the facts proved, after a proper charge, then the verdict should not be disturbed. It is enough for the court to see that justice has been done, and a new trial will not be granted, where it should produce the same result.

VIII. None of the defendant's exceptions are well taken, and the judgment should be affirmed.

MULLIN, J. The master of a vessel is for most purposes the agent of the owners of the ship and cargo; but that agency does not extend to a sale of either, unless there is a necessity, at the time, for so doing. (Abbott on Shipping, 365 *et seq.* in notes.)

The degree of the necessity which must be shown to have existed in order to justify a sale of ship or cargo has been differently stated by different judges and writers on maritime law. In 1st Parsons on Cont. 66, it is said: "He (the master) may sell the property entrusted to him in a case of *extreme necessity*, and in the exercise of a sound discretion. Nor need this necessity be actual in order to justify the master and make the sale valid. If the ship was in peril which, as estimated from all the facts within his means of knowledge, was imminent, and made it the most prudent course to sell the ship as she was, without further endeavors to get her out of her dangerous position, this is enough, and the sale is justified and valid although

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the purchasers succeed in saving her, and events prove that this might have been done by the master."

In 2d Smith's Leading Cases, 576, the author of the notes says, "In order to make out a case for a sale without express authority, it would appear necessary to show that the property at risk has been placed in a position of such *imminent danger* that it may be destroyed or materially injured, before recourse can be had to those to whom it belongs; unless the intervention of other means is resorted to than those which can be commanded by the master."

Chancellor KENT, in his Commentaries (vol. 3, 173, 4), says, "But if the voyage be broken up by ungovernable circumstances, the master in that case may even sell the ship and cargo, provided it be done in good faith for the good of all concerned, and in a case of *supreme necessity* which sweeps all ordinary rules before it."

Lord ELLENBOROUGH, in *Campbell v. Thompson* (2 E. C. L. 480), says, "The master can only sell the cargo in case of *urgent necessity*."

ABBOTT, Chief Justice, in *Trumen v. East India Co.* (7 E. C. L. 339), says there must be an *apparent necessity*. In the same case, BAYLEY, Justice, says, "It must be a case of *absolute necessity*." PARK, J., in *Skeen v. McGregor* (8 E. C. L. 309), says, "A sale can only be made in a case of *inevitable necessity*."

In Massachusetts, the court says, "there must be a *necessity*, or, as it is sometimes expressed, a *legal necessity*, before the master can sell." (*Bryant v. Commonwealth Ins. Co.*, 13 Pick, 543, 551.)

The difficulty lies not so much in finding the rule as in applying it in a given case.

There is no doubt but that, in order to justify the sale of a cargo at an intermediate port, several things must concur.

1. There must be a necessity for it, arising either from the nature or condition of the property, or from the ina-

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bility to complete the voyage by the same ship or to procure another.

2. The captain must have acted in good faith.

3. He must, if practicable, consult with the owner before selling. (Abbott on Shipping, 447 and notes; *The New Eng. Ins. Co. v. Brig Sarah*, 13 Peters, 387; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543.)

No question as to the good faith of the captain, or of his inability, under the circumstances, to consult with the owners, is raised. But it is insisted that a necessity for the sale is not proved, for two reasons: 1st. Because the property, although injured, could by a moderate outlay have been put in order so as to be carried to New York without further material injury; and 2d. The master should have sent forward the property by another vessel.

Neither the master nor owners were answerable for the delay which had occurred after leaving Aspinwall. It was caused by a visitation of Providence, against which human foresight could not guard.

The damage to the hides arose from their own inherent properties and the heat of the climate in which the voyage was made. Before unloading the hides at Carthagena, the worms that caused the damage were discovered on the deck of the vessel—when the hides were taken from the hold and put on the deck—the hair was found eaten off and holes eaten in them; and, if permitted to remain in the vessel, it is not denied but that they would have been utterly ruined. The captain caused them to be beaten while on the deck, which it is shown is one means of removing, in whole or in part, the vermin that was causing the injury. The vessel was found not to be in a condition to continue the voyage, and another ship might have been procured to carry the hides to New York, as the purchasers of them at the master's sale chartered a vessel which brought them to New York.

If the hides were then in a condition which justified a

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sale in order to prevent total loss, it would seem to follow that it would have been folly to have hired another vessel to bring to New York property that would be ruined before it arrived.

The question then comes to this: Was the master justified in selling the property at Carthagea? or, in other words, was the condition of the property such that it was necessary to sell it in order to prevent a total loss? It does not appear that the captain had any acquaintance with the means of preventing injury to hides by vermin, other than is possessed by every person in the community. He was called on to deal with the property as it then was, without any peculiar skill as to the best mode of protection or cure. It was quite obvious the property must be removed from the hold, and the master did it. Beating the hides was a mode in which the worms could be removed for the time being, and that was done. There is no evidence that the master knew that washing in sea water would be any greater protection than the means he had already employed. Under these circumstances, he summoned three respectable men, dealers in hides and the shipment thereof from Aspinwall to Carthagea and from the latter place to New York, to examine the hides and declare what it was proper for him to do under the circumstances. They advised a sale, and the hides were sold, and, as witnesses, they swear that the advice was given in good faith. This advice was not conclusive; but the question is whether, on view of the facts then known to the parties, it was apparently necessary to sell the hides. The remarks of PARKER, Ch. J., in *Gordon v. Massachusetts Fire and Marine Insurance Co.* (2 Pick. 263), in regard to the weight which should be given to a survey of a vessel made after injury, in order to determine what it is the duty of the master to do with her, apply with great force to the point under consideration. He says, when a vessel has been so far injured by a peril of the sea as to make a survey necessary,

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and the master, with perfect good faith, calls such a survey, and the persons appointed to take it are competent in point of skill and wholly disinterested, and they, after a full and sufficient examination of the vessel, find her essentially injured, and come to a fair conclusion that, from the high price of materials and of labor, or the difficulty of procuring them, the expense of repairing will be more than the worth of the vessel after she is repaired, and therefore they advise, for the interest of all concerned, that the vessel be sold,—in such a state of things as this, it seems to me that a moral necessity is imposed on the captain "to act according to their advice." The jury, in passing on the question of necessity, must take into consideration the opinion of these persons thus called on to aid the master by their advice, and that opinion is entitled to very considerable weight. "If," say the court in the opinion just cited, "they acted fairly and the captain acted fairly, his acts, in conformity with their opinions, will be justified unless it shall be made to appear by those who contest the loss that the facts on which they founded their opinion were untrue, or the inferences they drew from those facts were incorrect; and the burden of proof should be on those who would impeach their proceedings."

But it is said that the persons who gave the opinion that the cargo ought to be sold, assumed, as part of the groundwork of their opinion, that the hides were to remain on the Pedee and be carried to New York in her, instead of being sent forward by another vessel, as it was the master's duty to do.

The survey, as it is called, does say that the vessel, having to be repaired in Carthagena, and then go to St. Jago de Cuba, before the hides could reach New York, it was almost certain that not a single hide would arrive at that place. But in the evidence of these witnesses they go much further than this survey, or rather it is stated as their opinion that the property was in such a condition that it

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ought not to have been re-shipped. Horner testifies that it was his opinion that the hides ought to be sold. Hana-bergh says the sale was proper and necessary, owing to the condition of the hides; Foster that a large portion of the hides were only fit for glue—they would become worse daily until totally destroyed. Before examining the hides he thought the best course would be to re-ship them; but, on examination, he was of opinion that the master's only and best course was to sell them. Sanchez, one of the surveyors, testifies that the re-shipment involved the actual loss of the hides. Barros says the hides were too much damaged to be kept any longer without danger of a total loss.

Other witnesses qualify their opinions by saying that the hides would be a total loss if re-shipped on the *Pedee*, to be by her carried to New York.

I have referred to the opinions of the witnesses to show that there was a question for the jury on the facts, as to the necessity of the sale, and that it was wholly improper, in view of this evidence, to render a verdict for the plaintiff. If the jury should believe, from the evidence of the witnesses, that, judging from the condition of the hides as they were when found on the wharf at Carthagena, that if re-shipped by any vessel, and sent to New York within a reasonable time, they would be so damaged as to be practically valueless as hides, the defendants would be entitled to a verdict.

Although it has happened that the hides did arrive in New York, and were sold for a much larger price than that received in Carthagena, and although it is competent to prove those facts, and for the jury to consider them in determining the question of necessity, yet the question, after all, must be determined upon the facts existing at the time when the sale was made.

In every aspect in which I have examined the case, a case is presented which made it necessary to submit it to

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the jury; and because it was not done, the judgment of the supreme court must be reversed and a new trial ordered, costs to abide event.

All the other judges concurring, except WRIGHT, J., who did not vote, judgment reversed.

Abstract of case.

CHARLES YORK v. ISAAC B. ALLEN and others.

It is extremely doubtful whether one commissioner appointed under the act of the legislature "authorizing a loan of moneys to the citizens of this State," passed April 11, 1808, can demand the principal sum due on a mortgage given to the commissioners, so as to put the mortgagor in default for non-payment, and justify a sale of the mortgaged premises. *Per* WRIGHT, J.

But it is very clear that a notice and sale by one commissioner only, is a nullity, and a conveyance executed by him to the purchaser at such sale a void act.

In 1849 and 1850, there being but one loan commissioner under the act of 1808, in the county of Chenango, the person appointed in 1849 refusing to qualify or act, the sole commissioner proceeded to notify mortgagors that the payment of the amount due on their mortgage would be required November 1, 1849. On that day he caused a notice to be first published of a sale of the premises embraced in such mortgage on the 7th of February, 1850. This notice was signed by him as "loan commissioner," and was published once in each week for twelve weeks. On the day appointed he put the premises up at public auction, and sold the same to B., the highest bidder, and afterwards gave him a deed not in conformity with the statute, and not having the seal of office of the commissioners affixed, nor two witnesses thereto. *Held*, that the whole proceeding was a nullity; the sole commissioner having no authority either to sell or convey.

It is the commissioners of loans in their corporate capacity, that the statute provides, in case of default in payment of principal or interest, shall be seized of an absolute, indefeasible estate in the lands, &c. mortgaged to them; *they* are required to give the notices and make the sale; and *they* only, under their seal of office, can convey to the purchaser.

Where a grantor covenants in his deed that he is the lawful owner of the premises conveyed, and that the same are free from all legal claims and incumbrances, it is no defence to an action to foreclose a mortgage given for the purchase money, that the premises were at the time subject to the lien of a loan office mortgage, where there has been no eviction of the purchaser, or disturbance of his possession.

If there is any breach of the covenant against incumbrances, the purchaser has his remedy by action. He cannot voluntarily yield up the premises to one having no title thereto, and then ask that his equity of redemption shall not be foreclosed, or he be made personally to respond for any deficiency.

Although the statute declares that in case of default in payment of a mortgage to loan commissioners when demanded, the commissioners shall

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be seized of an absolute, indefeasible estate in the lands, &c., this will not entitle them to maintain ejectment in such a case.

Nor does the statute seem to contemplate that they are to enter into and take possession of the lands, until after a failure at public sale to obtain a bid or the amount due on the mortgage, or, having obtained such bid, there shall be an omission to pay.

Appeal from a judgment of the Supreme Court, modifying and affirming a judgment entered on the direction of a single judge in a foreclosure suit.

On the 19th day of March, 1842, the plaintiff, York, and Esther, his wife, for the consideration of twelve hundred dollars, executed and delivered to the defendant, Allen, a deed of conveyance in fee simple, with full covenants of warranty, of the lands in controversy in this suit—the grantors covenanting among other things, that they were the true and lawful owners of the said premises, and that the same were free from all legal claims or incumbrances whatever. In consideration of said deed, and the covenants therein contained, the defendant, Isaac B. Allen, executed the bond, and he and defendant, Betsey, his wife, executed the mortgage mentioned in the complaint, for the whole purchase money of said premises; which mortgage the plaintiff seeks to foreclose. On the 13th day of June, 1808, one Russel Steward, the then owner of the premises, and through whom the plaintiff derived his title, executed to the commissioners for loaning money of the county of Chenango, a mortgage of the same premises, to secure the payment of the sum of twenty-six dollars loaned to him, Steward, by said commissioners. This loan mortgage was a valid and subsisting lien upon said premises, at the time York's deed to Allen bears date. In February, 1850, this loan mortgage was foreclosed, and the premises sold by Laman Ingersoll, Commissioner of Loans—there being but one commissioner at the time—and were bid off by the defendant, Ansel Brown, for the sum of \$43.83, and Ingersoll, as commissioner, executed to him a deed; and on the first day of April, 1850, Brown took possession of the premises

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and has remained in possession ever since. In December, 1851, the defendant, Brown, mortgaged the premises in question to the defendant, Wells, to secure the payment of \$500. York never has paid, or offered to pay the loan mortgage, but seeks by this suit to foreclose the mortgage given by the defendants, Allen and wife, and to make Allen pay the deficiency—the whole amount being some \$1800. The cause was tried before Justice MASON, at a special term of this court, held in Chenango county, in August, 1858, and the plaintiff had judgment for the relief demanded in the complaint, and also that the loan mortgage be first paid out of the proceeds of the sale. The defendants, Allen, Brown and Wells, appealed to the general term, and in May, 1859, the judgment was affirmed, with a certain modification expressed in the order of affirmance. The defendants, Allen, Brown and Wells, appealed to this court.

R. K. Bowne, for the appellant Allen.

S. S. Merritt, for the appellants Brown and Wells.

W. Newton, for the respondent.

WRIGHT, J. The action was to foreclose a mortgage given in March, 1842, by the defendants, Allen and wife, to the plaintiff, to secure the payment of the sum of \$1200 in six annual installments, with interest annually from 1st of April, 1842. The mortgage was upon two parcels of land; the one of principal value being a lot described as containing twenty-five acres and upwards. Allen paid the interest up to April, 1848, and a part of the principal, but paid nothing afterwards. Brown and Wells were made defendants as claiming to have some interest in, or lien upon the mortgaged premises, or a part thereof, which interest or lien it was alleged accrued subsequently to the lien of the plaintiff's mortgage.

The mortgaged premises were sold to Allen in March, 1842, and he gave back to the plaintiff his bond and the mortgage in question to secure the payment of the purchase money. In April, 1850, Allen voluntarily surrendered the possession of the twenty-five acre lot, parcel of the mortgaged premises to the defendant, Brown, the latter claiming title thereto under a deed from one Ingersoll, as commissioner for loaning moneys in the county of Chenango, under the act of April 11, 1808, entitled "An act authorizing a loan of moneys to the citizens of this State." It was proved that the amount due and unpaid on the defendant's bond and mortgage was \$1807.82.

Under these circumstances it is difficult to perceive what possible defense Allen, the mortgagor, can have. It is said that the plaintiff covenanted in his deed of the premises that he was the lawful owner thereof, and that the same were free from all legal claims or incumbrances whatever. But suppose he did. It is not disputed that he was seised of the premises; and if there was any breach of the covenant against incumbrances, the defendant had his remedy by action. He could not voluntarily yield up the premises to one who, it will be seen hereafter, had no title whatever thereto, and ask that his equity of redemption shall not be foreclosed, or he made personally to respond for any deficiency. It is urged that the commissioners could have maintained ejectment against him the moment the default in the non-payment of the loan office mortgage occurred; and that he was therefore right in giving up the possession to save himself from the costs of a litigation at the suit of the commissioners, in which he was sure to be beaten. To this there are conclusive answers.

First. It is by no means clear that the commissioners could have maintained ejectment immediately upon the default occurring, or at all. The act, it is true, provides that in case of default in payment of interest or principal, when demanded, the commissioners "shall be seised of an

absolute indefeasible estate in the lands, tenements or hereditaments thereby mortgaged to them, their successors and assigns, to the uses in this act mentioned." (Laws of 1808, chap. 216, § 15.) This would not entitle them to maintain ejectment; although the mortgagor would have no legal title that he could directly enforce against the law itself. The uses in the act mentioned are to sell the lands at public vendue, after notice given, to the highest bidder, and from the proceeds of the sale, to retain in the hands of the commissioners the moneys due on the mortgage, with the expenses of the sale, paying over to the mortgagor, his heirs or assigns, any surplus. (§§ 19, 20.) If there are no bids at the time appointed for the sale, or if the person to whom the property has been struck off, shall not pay for the same, the commissioners can enter into and take possession of the lands, and let them on the best terms they can for the benefit of the State, until the third Tuesday in April then next, and on the latter day (having given at least six weeks notice), again to offer them at public vendue to the highest bidder. If upon such sale no person shall bid, or offer to give for the lands the sum of money for which the same were mortgaged and remaining unpaid, with the interest then due thereon; or if any person to whom they shall be struck off shall not pay for the same, then the commissioners are to purchase and hold the same for the benefit of the people of the State; but if the mortgagor, or his or her heirs or assigns, shall at or before the sale of the mortgaged premises, pay to the commissioners all such sums as shall be payable on such mortgage, for principal and interest, together with the charges for advertising the same, then the commissioners are to accept the same, and permit the owner or his heirs or assigns to take possession of the mortgaged premises, and to hold the same until default shall be made in payment of any further sum on the mortgages. (§ 19.) Thus the statute provides for reimbursing the State for the moneys loaned on the lands,

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either by public sale of them to the highest bidder, or by payment by the mortgagor after default and before sale, or by purchasing them in, under certain circumstances, for the benefit of the State. The commissioners cannot maintain an ejectment; nor does the statute seem to contemplate that they are to enter into and take possession of the lands, until after a failure at public sale to obtain a bid for the amount due on the mortgage, or having obtained such bid, there shall be an omission to pay. If the commissioners make a legal sale and conveyance of the premises, as the act prescribes, the title vests in the purchaser; if they purchase them in, it vests in the State.

Second, There was no eviction of the defendant; nor was any threatened; nor did they take any steps to enter into and dispossess the defendant summarily or otherwise. Indeed there are strong grounds to suspect collusion between Allen and Brown in the matter of the pretended sale and purchase under the mortgage to the loan commissioners. They were partners, doing business on the premises covered by the mortgage, and to which Allen had title. The payment was demanded of a mortgage taken by the commissioners of loans in 1808, for the trifling sum of twenty-six dollars, in which one Steward was the mortgagor, and which covered the twenty-five acre lot. It is found that it was properly demanded, and it is to be inferred that not only the mortgagor, but his assignee in possession of the premises, had notice. The interest had been paid on the mortgage up to June, 1849, so that only the principal sum of twenty-four dollars was due. Instead of discharging this trifling lien on property valued at over \$1200, and looking to the plaintiff's covenant against incumbrances for indemnity, or at least notifying the plaintiff that the principal of the mortgage had been demanded, Allen, the owner of the premises, allows them to be sold to his partner, Brown, for the sum of \$43.83, and then voluntarily surrendered their possession to the latter.

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Nor did the defendant Brown establish any defense. The Steward mortgage for \$26 was given in June, 1808, in pursuance of the act of that year, entitled "an act authorizing a loan of moneys to the citizens of this state." That act provided for the appointment of two commissioners in each of the counties of the state, to discharge the trusts and duties under it. (§ 3.) The commissioners in the several counties were to be bodies politic and corporate, in fact and in law, by the name and style of "the commissioners for loaning money of the county," of which they were respectively commissioners, with full power to every of the said bodies politic to have and use a common seal, and, under the same seal, and in the name of the same bodies politic, to give receipts, to take mortgages, and to execute releases and conveyances of the mortgaged premises, and to sue and be sued, and generally with all such powers as are necessary for the due execution of the trusts reposed in them by this act." (§ 6.) All the powers conferred were upon this *quasi* corporation, and the trusts and duties prescribed by the act could only be discharged by the commissioners as such. It is extremely doubtful whether one commissioner could demand the principal sum due on a mortgage, so as to put the mortgagor in default for non-payment, and justify a sale of the mortgaged premises. But, however this may be, it is very clear that a notice and sale by one commissioner would be a nullity, and a conveyance executed by him to a purchaser at such sale a void act. In this case, the interest was paid on the Steward mortgage given to the loan commissioners in 1808, up to the 5th June, 1849. The principal was not called for by the comptroller until the 1st August, 1849, and then payment was required to be made on the 1st November following. In 1849 and 1850 there was but a single loan commissioner under the act of 1808 in the county of Chenango, the person appointed in 1849 refusing to qualify or act. The commissioner proceeded to notify the mortga-

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gors (Steward included) that payment of the amount due on their mortgages would be required on the 1st November, 1849. On the latter day he caused a notice to be first published in a newspaper printed in the county of Chenango, of a sale of the premises embraced in the Steward mortgage, on the 7th February, 1850. This notice was signed "Laman Ingersoll, loan commissioner," and was published in the newspaper once in each week for twelve weeks successively. On the 7th of February, 1850, he attended in pursuance of the notice, and the premises were put up by him at public auction, and sold to the defendant and Brown for \$43.83, he being the highest bidder. Whether this was the amount due on the mortgage, and the expenses of the sale, or whether Brown, in fact, paid his bid, does not appear. Ingersoll, however, after the sale, gave Brown a deed of the premises, not in conformity with the act of 1808, or executed as that act required. The parties to the deed are Laman Ingersoll, commissioner for loaning money of the county of Chenango, and Ansel Brown. Ingersoll acknowledges the receipt of the consideration money instead of the commissioners. The grant is by him and not by the commissioners, and does not convey (as the statute prescribes), all "the estate, right, title, interest, claim and demand whatsoever" of the commissioners, and their successors, to the premises. The seal of office of the commissioners is not affixed to the deed, nor were there two witnesses thereto, as required by the act. (Laws of 1808, chap. 216, § 23.) The deed was subscribed "Laman Ingersoll, loan commissioner," with his seal attached, and there were no witnesses thereto.

The whole proceeding, therefore, by which Brown was invested with any claim or title to the mortgaged premises, was a nullity. Ingersoll had no authority either to sell or convey. (*Powell v. Tuttle*, 3 Comst. 396; *Olmsted v. Elder*, 1 Seld. 144.) It is the commissioners, in their corporate capacity, that the statute provides, in case of default

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in payment of principal or interest, shall be seised of an absolute indefeasible estate in the lands, tenements and hereditaments mortgaged to them; *they* are required to give the notice and make the sale, and *they* only, under their seal of office, can convey to the purchaser. The statutory system is complete in all its parts. The commissioners are created a body politic and corporate. As such they are to loan the public moneys, taking mortgages in their name of office. If the borrower make default in payment, the statute vests an indefeasible estate in the lands in the commissioners, and their successors and assigns, and forecloses and bars all equity of redemption of the mortgagor in the mortgaged premises. The commissioners are then, after notice, to sell the premises at public vendue, to the highest bidder, if such bid shall be equal to the sum of money for which the lands were mortgaged, and the interest thereon, and the purchaser shall pay the same (and not otherwise), the commissioners are to convey the lands to him by deed, affixing their seal of office, and subscribing their names to the instrument in the presence of two witnesses; and the statute declares that such purchaser "shall and may hold and enjoy the said lands, for such estate as was conveyed to the commissioners by the mortgage executed by the mortgagor, clearly discharged and freed from all benefit and equity of redemption, and all other incumbrances made and suffered after the execution of such mortgage by the mortgagor, his heirs or assigns." It is very plain that all that was done by Ingersoll, either in giving notice or selling under the Steward mortgage, or in conveying the lands to the defendant Brown as purchaser, was nugatory, and Brown acquired no title thereby.

The defendant Wells has no defense. In December, 1851, Brown mortgaged to him the premises in question to secure the payment of four hundred dollars. This mortgage is no lien on the premises, as against the plaintiff's mortgage.

I am of the opinion, therefore, that the judgment of the

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supreme court should be affirmed. In that judgment, as modified by the general term, the mortgage executed by Steward to the commissioners of loans of Chenango county was treated as a subsisting lien, and the amount due thereon directed to be deducted from the amount due on the plaintiff's mortgage, and applied to its redemption and payment; and that the plaintiff have leave to redeem, pay and discharge the said mortgage by paying the amount due thereon. This was all that the defendant Allen was legally entitled to ask. The deed under which Brown claimed to hold was void, and of no effect; and Wells' mortgage was void as against the plaintiff's mortgage, and as a lien upon the premises covered by such mortgage.

All the other judges concurred, except SELDEN, J.—who expressed no opinion—and HOGEBOOM, J., who was for reversal, for the reasons given as follows:

HOGEBOOM, J. Assuming the judgment of the court below to be right in substance, I think there is a substantial defect of parties, which will prevent its having complete legal effect. The complaint sought to foreclose Allen's mortgage, and to set aside Brown's deed and his mortgage to Wells. Both the special and general term held the foreclosure of the loan office mortgage invalid, and consequently ineffectual, but nevertheless allowed a foreclosure of the plaintiff's mortgage on payment of the loan office mortgage out of the proceeds of the sale; or, as modified at general term, on payment of the latter mortgage to the loan commissioners. Prior to this suit the loan office mortgage had become due, and a default had occurred in the payment of the principal and interest moneys secured thereby. The loan office commissioners, or the people of the state, had in consequence become vested with a redeemable or irredeemable estate or interest in the premises. This interest remained in them if the loan office sale was invalid. They—that is the people or the loan office com-

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missioners—were necessary parties to a suit for the foreclosure of the plaintiff's mortgage, at least if it were attempted thereby, as is done by the decree in this suit, to cut off their rights and to pass a perfect title to the purchaser under that decree. It is not an answer to this to say that the commissioners are protected because payment of the loan office mortgage is required to be made to them. The objection remains, that they are not parties to the suit; that they have a right to be heard, and may possibly set up a state of facts which will preclude any relief to the plaintiff. There is no more dangerous practice than to condemn or foreclose parties unheard.

I regard this as an effectual objection to the affirmance of this judgment, unless the case can be disposed of by a modification of the decree in question, leaving the loan office mortgage, and the rights attempted to be acquired under it, untouched. But I do not well see how this can be done. According to the decision of this court in the case of *Pell v. Ulmar* (18 N. Y. R. 139), the utmost right which the plaintiff or the assignee of the mortgagor has is not a general equity of redemption, but a special right to redeem. He does not in his complaint, and did not at any stage of the trial, attempt the enforcement of any such right. He does not claim to redeem from the loan office mortgage, or offer to pay the sum due upon it; but simply to set aside the loan office sale, apparently treating all the interest of the loan office commissioners as having passed to the purchaser at that sale.

If it be said, this suit may nevertheless be treated as simply a foreclosure of the plaintiff's mortgage, and the decree modified accordingly, I think there are several objections to such a proceeding. 1. The complaint seeks much broader relief, and the litigation has been conducted with a view to it; and it would change the whole scope and character of the proceeding to give such an aspect to it at this time. 2. One of the leading objects of a fore-

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closure suit is to make a perfect title to the premises sold, and to make all persons parties to the foreclosure who have the remotest interest in the premises. An exception is sometimes made in favor of a prior mortgage, but then the complaint asks and the decree provides that the foreclosure and sale are subject and without prejudice to such prior mortgage. 3. The plaintiff no longer has any such effectual mortgage upon the premises as is set forth in the complaint. He has lost many of his rights and some of his remedies by the default which has occurred in the payment of the loan office mortgage. If the sale under that mortgage had been conducted according to law, his rights would have been forever lost, and this suit must have been dismissed with costs. As it is, he has, as already stated, but a special (if any) right of redemption, and it is *that right* which should have been attempted to be enforced in this action. The defendant Brown, having acquired peaceable possession through the forms of the loan office sale, and peaceable surrender from Allen, can not, according to the case of *Pell v. Ulmar*, be treated as a mere intruder, but as clothed with some rights under the loan office mortgage from the combined action of the loan office commissioner and the defendant Allen. How far these rights may be successfully displaced by the plaintiff's action, must be determined by subsequent litigation.

Whatever equities, therefore, in view of some of the facts of this case, the plaintiff may be deemed to have against some of the parties to this action, he is not in a condition to assert them, by reason of a radical defect of parties, and of substantive allegations in his complaint.

I am of opinion that the judgment of the court below should be reversed, with costs to abide the event, and with leave to the plaintiff to apply to the supreme court, on such terms as that court thinks proper, for permission to amend his complaint and add new parties to the action.

Judgment affirmed.

Statement of case.

NELSON J. BEACH, receiver &c. v. GEORGE W. SMITH.

S. subscribed for \$500 of stock in a railroad company, upon the understanding that the first ten per cent required by law to be paid in cash on subscribing, should be paid by his services in procuring subscriptions and right of way. He subsequently presented an account against the company for services, from which it appeared that at the date of the subscription the company was indebted to him in an amount greater than the cash payment required, in which account he applied and credited fifty dollars for ten per cent upon his subscription, and fifty dollars for the first call made thereon. The account was allowed by the company, and the balance paid to S. *Held*, that this was a sufficient compliance with the statute, in respect to the payment of the first ten per cent, and made the subscription obligatory upon S.

THIS action was brought by the plaintiff as receiver of the Ogdensburgh, Clayton & Rome Railroad Co., to recover the balance due to that company upon the defendant's subscription to the capital stock thereof. The facts found by the judge who tried the cause are: That the company was duly incorporated under the laws of this State, and its articles were duly filed on the 16th of April, 1853; that afterwards, on the 2d day of July, the defendant subscribed the subscription book and articles of association, and by said subscription agreed to pay said corporation the sum of five hundred dollars, being for five shares of the stock, as the same should from time to time be called for; that the defendant did not at the time of subscribing, make any payment upon said subscription to said corporation, and had no funds of said company in his hands; that afterwards, and about October 31, 1853, the directors of said corporation made four calls of ten per cent upon the subscriptions to the capital stock of the said company, payable respectively February 1, 1854, May 1, 1854, August 1, 1854, and November 1, 1854; and that about the 26th day of October, said directors made two other

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calls upon the subscriptions to said capital stock, payable respectively February 1, 1855, and November 1, 1855, of all which calls the defendant had due notice; that on the 25th of February, 1854, the defendant presented his accounts for services for said company in procuring subscriptions and right of way as agent of said company, subsequent to said subscription, from April 1, 1853, and which was dated February 25, 1854, and amounted to the sum of \$410. And upon said account applied and credited several sums of cash received by him subsequent to his said subscription, for subscriptions of various persons to the capital stock of the company, and also credited therein fifty dollars for ten per cent upon his said subscription, and also fifty dollars for the first installment or call upon his subscription, payable February 1, 1854, and leaving after the application of such payments and credits, the sum of two hundred dollars due to said defendant by the company, which balance was paid to said defendant by the company; and that it was the agreement and expectation and design of the defendant and of the company's agent, at the time of subscribing, that the first ten per cent required to be paid in cash on subscribing, should be paid by the defendant's services thereafter, and was in fact paid in that manner only, in pursuance of such agreement. The judge held as matter of law, that the application of the defendant's account for services, upon his said subscription, was a sufficient compliance with the statute in respect to payment of the first ten per cent, and made the said subscription obligatory upon him. Judgment upon the trial was given for the balance due upon said subscription, and the same was affirmed at the general term, and the defendant appealed to this court.

G. W. Smith, appellant, in person.

I. The ten per cent. not being paid at the time of making the subscription, the attempted contract was illegal and

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void, and no action can be maintained upon it. (1 R. S. 1222, § 4, 4th ed.; Laws of 1850, chap. 140, § 4; *Crocker v. Crane*, 21 Wend. R. 211; *Jenkins v. Union Turnpike Company*, 1 Caines' Ca. 86; Angell & Ames on Corporations, chap. 8, § 12; *Safford v. Wyckoff*, 4 Hill, 444-7.)

1. The contract is illegal and void because it is against the express prohibition of the statute. The statute is not merely directory. It first says that the ten per cent. shall be paid at the time of subscribing, and then that the subscription shall not be received or taken unless the ten per cent. be so paid. Negative words in a statute are imperative. (7 Wend. R. 31, and cases cited p. 34.) It is believed no case can be found where an action has been sustained which goes in affirmance of an illegal contract, when its object is to enforce the performance of an engagement prohibited by law." (20 J. R. 397; Smith on Stat. 780; Broom's Legal Maxims, 350; *Rex v. Leicester*, 7 Barn. & Cress. 12; *Bank of United States v. Dandridge*, 12 Wheat. Rep. 878.) Where it is held that a by-law requiring a cashier to give "approved securities," &c., is directory, but where it is conceded that "if the statute had prescribed that the cashier should not be deemed for any purpose in office until such approval, his acts would have been utterly void." Without the cash payment in this case there is no subscription, as in the case above there would be no officer. "In deciding whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract," &c. (Ang. & Ames on Corp. 234.) "It is a first principle, not to be touched, that a contract, in order to be binding, must be lawful." (*Belding v. Pitkin*, 2 Caines' R. 149.) "Where a contract which is illegal remains to be executed, the court will not assist either party in an action to recover for the non-execution of it." (*Shiffner v. Gordon*, 12 East, 304; *White v. Franklin Bank*, 22 Pick. 184.)

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II. The transaction being a violation of a statute declaratory of a public policy, and prohibitive upon the company, it is incapable of ratification or affirmance by either, or both, of the parties.

1. The legal virtue of an affirmance, or ratification, or adoption of a contract, is to supply an assent, or authority, where they are wanting, and the parties have power to supply them. But here is an original want of power on the contracting party. The company had no power, but was prohibited to take a subscription without the payment of ten per cent. in cash at the time of subscribing. The company had no right to set aside that condition. It is a gross misnomer to call the attempt to do so a "waiver." Parties can only waive conditions introduced or existing in favor of, or securing to them some benefit or right. This condition is in favor of the public. No act of recognition or affirmance on the part of the subscriber could supply the defect of power on the part of the company; only the legislature could take off the prohibition and restore the power. To say that an act of a subscriber, itself falling short of the legal requirement, (in not being a cash payment,) can give legal vitality to void acts on the part of the company, looks like a double absurdity. (*Hodges v. City of Buffalo*, 2 Denio, 112-13; *Boom v. Utica*, 2 Barb. S. C. 111; *Thayer v. Boston*, 19 Pick. 511.)

2. The invalidity is not to be supplied by ratification, because it arises from want of compliance with a statutory injunction binding upon the parties, and introduced for the benefit of the public. Only the legislature can "waive" it. Neither party can ratify, because neither can dispense with the condition precedent. (Story on Agency, §§ 240, 241; Coke on Litt. 295 [b]; *Dawes v. North River Insurance Company*, 7 Cow. 462.)

3. So long as the prohibition stands it bars all contracts that violate its terms, and the taint of illegality remains

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and extends through all renewals or changes of the original contract. (Story's Equity Jur. § 307.)

4. The obvious intent of the statute is to utterly withhold a legal sanction from any subscription not accompanied by the cash payment of the ten per cent. The object of the statute would be defeated by allowing enough of legal vitality to inhere in the transaction to render it capable of ratification. What force would this prohibition have if companies were allowed to employ subscribers paying nothing in cash, or otherwise, at the time of subscription, and afterwards to treat the cash ten per cent as being paid by an account for services? By this course, the fund intended to be raised as a cash basis and guaranty of a solvent undertaking, is only imaginary, and there is substituted for it the services of agents employed to recommend the enterprise to the public. The provision for the cash fund could, in this way, be entirely nullified. Such a construction ought to be put upon the statute as will not suffer it to be eluded. (Bouvier's Bacon, I. 7, 10; Ang. & Ames on Cor. 229, note.)

5. The statute denies to such a transaction any legal existence whatever. It says each subscriber shall pay ten per cent "in money" at the time of subscribing, and that "no subscription shall be received or taken without such payment." It is difficult to see how a subscription which the statute says shall not exist at all, can have any standing, so that it may be ratified or affirmed. (*Smith v. Saratoga Mutual Insurance Co.* 3 Hill, 511, and cases cited.)

6. It must be admitted that up to the time of rendering the account and applying the credit for the ten per cent and succeeding installment, the contract was void. There was nothing for confirmation or ratification to work upon. If it should be held that there was a sufficient payment then, though not in money, still there was no signing. The term subscription has acquired a definite legal meaning, which the legislature must be presumed to have had

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in view. It means the manual act of subscribing the name; and this act must concur with the payment in money, else the contract prescribed by statute is not made. See opinion of PAIGE, J. as to statute of frauds, showing that an oral agreement for sale of property void, under the statute, might become a valid contract by a subsequent acceptance of property, for the reason that the words "at the time," were stricken out of the section as reported by the revisors; otherwise the delivery must have been concurrent. (*McKnight v. Dunlop*, 1 Seld. 542-3.)

7. The express requirement that the ten per cent be paid "in money," is as imperative as the requisition of pre-payment itself, and excludes all other modes of payment. The provision is in pursuance of the same policy which dictated the requirement of ten per cent "in cash" upon the amount of stock mentioned in section two, for securing a money payment of ten per cent upon the whole amount subscribed. Both provisions have the same object, are couched in equivalent terms, and should receive the same construction. Without the payment of the cash amount required by section two, there could be no valid organization. Without the ten per cent in money, pursuant to section four, there is no valid subscription after organization. Would it be pretended that the projectors of the enterprise could have taken receipted bills for agents' services in lieu of the ten per cent required by section two? (Bouvier's Bacon's Abridgment [g], 235; *Lake Ontario Railroad v. Mason*, 16 N. Y. R. 456; Ang. & Ames, p. 229-33, §§ 10-12; *Dawes v. North River Insurance Company*, 7 Cow. 462; 2 Johns. R. 114; 2 Cranch, 127; *The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company*, 7 Wend. R. 31.)

8. The dictum of Justice BACON in his opinion, that "payment in money *eo nomine* at the time of subscribing is not necessary," as applied to this case, has no authority to support it. Checks drawn upon cash funds, promissory

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notes paid in cash at maturity, may be sufficient *quoad* the money payment. Such instruments have been decided to be "money" for many purposes, but whether they are so for the purposes of this statute, is yet to be settled. But work and labor have never yet been deemed money, or the appropriate elements for making up a cash fund and basis for a financial enterprise.

III. The suggestion in the opinion, that an act done in disregard of the express prohibition of the statute is not void, unless so declared in the statute prohibiting it, is opposed, it is believed, by all authority. Acts, contracts, and undertakings in violation of statutory prohibitions, or of public policy, are void by a universal rule and operation of law. It is enough that they are forbidden by statute or a clear public policy. (Broom's Legal Maxims, p. 350; Bouvier's Bacon stat. (I.), 7, 10; P. 256 id. (G.), p. 235; *Tracy v. Talmage*, 14 N. Y. R. 180; *Sackett's Harbor Bank v. Codd*, 18 id. 246; *Safford v. Wyckoff*, 4 Hill, 444-47.) In *Wheeler v. Russell* (17 Mass. R. 281), it is said, "no principle of law is better settled than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law. (See also *Griswold v. Waddington*, 16 J. R. 486, per KENT; *Brady v. Mayor of New York*.)

1. For example, contracts to do any act on the Sabbath, prohibited by statute to be done on that day, are wholly void, on the ground of the prohibition merely. The prevailing doctrine throughout the United States is, that such contracts are wholly void and incapable of being made valid by a subsequent recognition, neither conferring rights nor imposing obligations upon either party. (New Am. Cyc. art. "Lord's Day.")

IV. Corporations must acquire their franchises and exercise their powers in strict pursuance of the statute or charter creating them. Having no original capacity like natural persons to make contracts, when their mode of contracting

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is prescribed by the statute, it must be followed. The statutory regulation is their peculiar law of contracting, as to essence, mode and form, and unless they conform to that law, no valid contract is made. (*Head v. Providence Insurance Company*, 2 Cranch. 127; Ang. & Ames on Corp. 278, § 6; *Union Bank v. McDonough*, 5 Louisiana R. 63.) "An act which is an attempt to evade the provisions of a charter confers no right on him who attempts it." (*Beatty v. Marine Insurance Company*, 2 J. R. 109; *Safford v. Wyckoff*, 4 Hill R. 444-47.) See also *The Life and Fire Insurance Company v. Mechanics' Insurance Company* (7 Wend. R. 31), where it is held that where a particular form of security is prescribed, every other form, as well as the contract itself, is void.

V. The case shows that the note was given and the subscription was received with a view to evading or disregarding the statute, and all that was done was in pursuance of that illegal attempt. The company, in order to swell its apparent cash subscription, undertook a dispensing power as to the requirement of payment at the time of subscribing, and of the payment of cash at all. The company intended a violation of the law, and the agreement by the subscription wrought out that intent. The subscription was but the instrument for effecting a fraud upon the law, and is only a portion of an entire illegal agreement. The evidence objected to was not given to vary the terms of the written agreement, but to show that it was involved in an illegal design. The court will leave parties to illegal contracts as it finds them, except where it interferes to relieve one not in *pari delicto*. The defendant is not, at any rate, bound beyond actual execution; and partial execution of a mutual illegal agreement has never been held to bind the party to complete performance, much less where the only party upon whom the prohibition is laid, is the party demanding the aid of the court. (*Norris v. Norris*, Adm'r, 9 Dana's R. 317; In notes, 4 Hill, 428; *Nellis v.*

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Clark, 4 Hill, 429; *White v. Franklin Bank*, 22 Pick. 189.)

VI. The clause in question is a statutory prohibition upon the company, and it alone is in fault. The defendant is not in *pari delicto*. He had a right to accept the stock on consideration of performing services afterwards. The statute, in the language of the cases, has marked the company as the criminal. (*Tracy v. Talmage*, 4 Ker. 162; *Curtis v. Leavitt*, 1 Smith, 9, 95; *The Sackett's Harbor Bank v. Codd*, 18 N. Y. R. 244; *White v. Franklin Bank*, 22 Pick. R. 181; *The Life and Fire Ins. Co. v. Mech. Ins. Co.*, 7 Wend. R. 31.)

1. The defense is the disaffirmance of the illegal, executory contract, and will be sanctioned by the court to vindicate the law. As to the part of the contract not executed, the law will not aid in the enforcement of a contract illegal in its inception. (2 Com. on Cont., cited 22 Pick. Rep. 184.)

VII. Conceding that some valid contract was got into being by the pretended ratification, then what was ratified? It must be the actual contract. If the company adopt the act of their agent, they must adopt it in all its parts, as well the stipulations favorable to the defendant, as those beneficial to the company. The ratifying act is in pursuance of the terms of the agreement alleged by the defendant, and must have force, if at all, by way of affirming the whole of that verbal contract. It can not be said that the execution of that contract, so far, is a constructive adoption of another contract which he really never made. When the company dispense with the defendant's services, he must be permitted to decline the stock. He never agreed to pay cash for stock. Nor is the company injured by the refusal of the defendant to proceed further with his contract. He gets no stock, and the company has the benefit of the defendant's services to the extent of some \$200 for nothing.

1. The proof shows that the real contract was to pay

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for the stock in services. The defendant so swears explicitly; and the agent, Doty, does not deny this; he only says: "I did not consider that I made any agreement," and upon cross-examination further says: "I undoubtedly said to the defendant, at the time of subscribing, that the whole amount of his subscription and more would be required in services for the company." It is not to be supposed the defendant would have taken the stock on any other consideration.

2. The company adopting the act of its agent, Doty, so far as to consider him a subscriber upon the terms verbally stipulated, and paying the defendant \$410 in pursuance of that contract, can not now repudiate it as to the residue. (Story on Agency, § 250.) The contract ratified is the contract to take stock and pay for it in services. Confessedly the action can not stand on the written contract alone; the ratification is the sole reliance for giving it life. But the ratification can not take place otherwise than according to the intention of the party. A ratification is a new contract or a new element of assent added to a defective transaction in order to make a complete contract. In either case it can have effect only according to the meaning and intent of the party ratifying. The legal effect of a ratification is to disclose the intent, to supply authority, to manifest an assent. Now the act of the defendant was clearly intended for no other purpose except to pursue and execute the contract for services to be rendered for stock. His agreement was not to pay money; the fact is so found in regard to the first \$50; the next two installments are also paid in services, and \$270 is also exacted in further payment of services. If the first installment which is expressly required by statute to be paid in cash, was agreed to be paid by work and labor, and the two following were paid in the same manner, these facts are strong corroboration of the defendant's defense. Another \$100 is paid in the same way, and while the company pay the defendant

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cash, none is required of him. Can it be pretended that this transaction is a ratification of a contract to pay cash on the subscription? It is submitted that the whole evidence shows clearly that nothing was intended to be ratified except the verbal contract to render services for stock, and that the defendant signed only upon that consideration. This was the only arrangement in contemplation of either party when the bill was rendered and allowed.

VIII. The company can not ratify the act of their agent if they could not in the first place dispense with the cash payment of the ten per cent. on the subscription. If the company could not make such a contract, the subscriber could not be bound. It is the illegal act of the agent in taking the subscription in violation of law that needs to be aided, and that can not be cured. (*Hodges v. Buffalo*, 2 Den. 113; *Thayer v. Boston*, 19 Pick. 511; *Boom v. Utica*, 2 Barb. S. C. R. 111.)

IX. The agreement as to payment for services, the first ten per cent. being paid, would then be valid. It was the agreement acted upon, and the company cannot now claim anything but the stipulated services. (*McKnight v. Dunlop*, 1 Seld. R. 542-3.)

X. The company has parted with nothing, and suffers no injury by a disaffirmance of the contract. In various cases where corporations, having a general power to loan money, &c., unlawfully take a particular security, prohibited by law, they have been allowed to recover for the money loaned, on the equity of the case, and on the ground that only the security was avoided, and not the contract of loaning. But in this case the entire act was specifically prohibited, both as to the form and substance of the transaction. No equity existing in behalf of the company, the court will not be astute in providing a means or theory of recovery, by supposing a sort of floating and contingent contract illegal in the start, and awaiting future adoption and recog-

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dition. (*Life and Fire Insurance Co. v. Mech. Ins. Co.*, 7 Wend. 34, and cases cited; *Philadelphia Loan Company v. Towner*, 13 Mass. R. 249.) The charter of the life and fire insurance company (above) provided that \$250,000 might be invested by the company by means of loans on bond and mortgage, "and in no other way whatever," but the contract or security upon a prohibited loaning was not expressly avoided. The mere prohibition was held to make the whole contract illegal. (Laws of 1822, chap. 51, § 9.)

XI. The class of cases which hold that a corporation making contracts not authorized by statute, nor within its proper powers, may still recover for property parted with, money loaned, &c., affords no authority for sustaining this transaction. Here the contract is not merely *ultra vires*, or such as authorizes the animadversion of the legislature only. It violates an express prohibition, operating both affirmatively and negatively, and a prohibition directed against a particular act. The only public policy contravened by acts *ultra vires*, is that which dictates the restraining of corporations generally to their proper scope and the legitimate purposes of their creation. There is a clear ground of distinction upon which contracts which are a mere excess of authority may not be declared void, while those which violate express prohibitions must be, unless the courts shall assume the power of controlling the legislative will.

John H. Reynolds, for the respondent.

I. The defendant's subscription was not originally invalid. It is provided by section 4 of the general railroad act, relating to subscriptions for stock after the corporation has been formed, that "at the time of subscribing every subscriber shall pay to the directors ten per cent. on the amount of his subscription, in money, and no subscription shall be received or taken without such payment."

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1. It is not declared that a subscription shall be void which is not attended with the payment of ten per cent. in money. The directors are forbidden to receive a subscription without the payment of ten per cent. in money, but if they do receive it without exacting the payment of the money it is not declared that the contract of subscription is void.

2. The contract of subscription is not void, but may be enforced against the subscriber although the directors receive it without the actual payment of ten per cent. in cash.

3. There is no principle of policy, public or private, promoted or preserved by declaring such a subscription invalid; on the contrary, great wrong to creditors and stockholders might follow from releasing a subscriber under such circumstances from all liability.

4. The provision requiring the payment of ten per cent. was obviously intended for the benefit of the corporation and all who might become interested in its affairs, and it may be waived at the request of the subscriber without impairing his legal obligation arising out of his subscription.

5. The reception, by the directors, of a subscription without the payment of ten per cent. in money does not constitute an illegality which enters into and forms a portion of the contract of subscription. It is rather incidental and collateral and is not inherent in the contract, and does not form a part of the consideration. (Story on Contracts, § 621; *Wetherell v. Jones*, 3 Barnw. & Adolph, 624; *Ferguson v. Newman*, 5 Bing. N. C. 84; *Johnson v. Hudson*, 11 East, R. 180.)

6. If the directors commit a breach of duty in receiving a subscription without the payment of money, they may be punished as for a misdemeanor, and are liable in damages to the party injured by the breach of duty. So far as the subscriber is concerned, his obligation to pay arises when he subscribes, and it remains until it is discharged by

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payment. (2 Rev. S. p. 696, § 39; *Town of Milfred v. Town of Worcester*, 7 Mass. R. 48; *Parton v. Harvey*, 1 Gray, 119; 2 Kent's Com. 90, 91; 2 Greenleaf Ev. § 460; *Mott v. U. S. Trust Company*, 19 Barb. 568; *Chester Glass Co. v. Deary*, 16 Mass. 94; *Palmer v. Lawrence*, 3 Sandf. S. C. R. 161; *The Steam Nav. Co. v. Weed*, 17 Barb. 378.)

7. Furthermore, the provisions of the statute in respect to the payment of the ten per cent. in money is to be regarded as directory and not prohibitory. (Story on Con. § 623; *Brooks v. Ryan*, 2 Story R. 542; *Johnson v. Hudson*, 2 East, 180; *Warren v. Manf. Ins. Co.*, 13 Pick. 518.)

II. The defendant is estopped from alleging the invalidity of the contract on account of his own wrong or omission of duty in not paying the ten per cent. in cash when he subscribed. His associate stockholders, as well as the creditors of the corporation, are interested to estop him; and if the statute imposed upon either the directors or the subscriber anything in the nature of a public duty in requiring the payment of the ten per cent., the defendant cannot set up his own wrong to get rid of his obligation. (*The Steam Navigation Co. v. Weed*, 17 Barb. 378; *Henry v. Vermillion R.*, 17 Ohio, 187; *Wright v. Selby R. R. Co.*, 16 B. Monroe, 5; Redfield on Railways, 86, 87, 88; *The Vicksburgh, &c., R. R. Co. v. McKean*, 12 Louisiana Rep. 638.)

III. A contract is not void as against a statute unless founded upon an illegal consideration which enters into and forms a part of the contract, or unless it provides for the doing of something distinctly forbidden. (2 Parsons on Cont. 542.)

1. In the present case, neither of these illegal elements exist in the contract sought to be enforced. It is lawful to subscribe and pay for railroad stock. It is the duty of the directors to exact, and of the subscriber to pay ten per cent. of the amount at the time of subscribing; but if this be omitted, the contract remains unaffected, and the obligation

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to pay still exists, as the only thing forbidden is the omission to exact payment of the ten per cent. at the moment of subscription.

2. A careful examination of adjudged cases will show that there is no reliable authority for the proposition that a subscription such as is involved in this case is void. (*Union Turnpike v. Jenkins*, 1 Caines' R. 381; Same case, 1 Caines' Cases in Error, 86, 96; *Goshen Turnpike v. Hurlin*, 9 Johns. 217; *Highland Turnp. Co. v. McKean*, 11 Johns. 98; *Rensselaer and W. Plankroad Company v. Barton*, 16 New York R. 457, per SELDEN, J.)

IV. But it is not material whether the subscription without the actual payment of ten per cent. in cash, was originally binding or not; it was certainly binding upon him from the time it was paid, and that was in February, 1854. The transaction by which the company had credit for \$210, on his account, which included ten per cent. on his subscription, and the first call of ten per cent. was in legal effect, the same as if he had paid the amount of his ten per cent. in gold coin. (See BACON, J. pages 20, 21 to 24; *Black River & Utica. R. R. Co. v. Clark*, 25 N. Y. R. 208.)

The judgment should be affirmed.

DAVIES, J. The subscription of this defendant was made under similar circumstances to that of Clarke, in the case of *Black River and Utica Railroad Company v. Clarke*, (25 N. Y. 208). We then said that the intent of the section of the general railroad act, requiring the payment of ten per cent. in cash on the amount of the subscription, to be made in cash at the time of subscribing, doubtless was that no subscription should be valid until ten per cent. was paid thereon, and not that it should be invalid if a short interval should occur between the actual subscription and the payment of the money. The subscription and the payment of the ten per cent. must both concur to make a valid subscription. The subscription one day, with pay-

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ment the next, would satisfy the statute; and so would actual payment at any period after subscription, with intent to effectuate and complete the subscription. The writing of the name in the subscription book should be deemed but part of the transaction, and provisional or conditional till the ten per cent. is paid. But after the payment, and as was said in that case, certainly after the payment of forty per cent. on the subscription, the statute requirement on this point must be deemed fully complied with by the defendant. There is nothing to distinguish the case now under consideration from that just referred to. It is apparent that the defendant commenced acting for the company as early as April, 1853, and his subscription was not made until July 2d of that year. It is fairly inferrible, from the amount of his account, that the company, at the date of his subscription, was indebted to him in an amount greater than the cash payment of \$50, required on his subscription. It would have been an idle ceremony for the company to have handed him the amount due, and for him to have paid it back to the company on his subscription. It is, however, sufficient, under the authority of the case just cited, that ten per cent., or first amount to be paid, has been subsequently paid, to render the subscription valid and binding upon the defendants. On the 25th of February, 1854, he in fact not only paid this ten per cent., but the first installment called for of ten per cent. payable on the first day of that month. He had, therefore, on that day paid twenty per cent. on the amount of his subscription, and he can not now be permitted to allege that it was invalid because he did not, at the time of subscribing, pay the ten per cent. in cash. The charging himself with, and the allowance by the company in the settlement with the defendant, of both of these installments, was a voluntary payment of them by this defendant to the company, quite as much so as if the company had handed to him in cash the whole amount of his account, \$410, and he had imme-

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diately handed back the sum mentioned therein, amounting to the sum of \$200. The allowance by him to the company of these sums, and the payment of the balance, was a payment of them by the defendant to the company.

The judgment must be affirmed, with costs.

MULLIN, J. I am not prepared to hold that a subscription for the stock of a railroad company organized under the general law is valid, if the ten per cent. required to be paid at the time of subscribing, is not paid. It seems to have been the opinion of the chancellor in *Jenkins v. Union Turnpike Company* (1 Caines' Case in Error, 86), that a subscription for stock without the payment of the five dollars required to be paid on each share at the time of subscribing, was void when the subscription was made to the stock before the organization of the corporation, but if made after, it might be valid. The statute under which the subscription in question is made, not only requires ten per cent. to be paid, but it forbids the subscription to be received without such payment. It seems to me that a subscription taken in violation of this prohibition is not binding.

But this court has held that the subscription may precede the payment of the ten per cent., and that when the ten per cent. is paid, the subscription is valid from that time. (*Black River and Utica Railroad Company v. Clarke*, 25 N. Y. 208.)

The only remaining question is, whether the ten per cent. has been paid?

The payment was in services performed under a contract with the company. No price was agreed on for the services before they were rendered. The price must have been ascertained before there could be an application of them on the stock. When the account was rendered and allowed, the defendant was owing the company that portion of the stock which had been called for by the directors, and the

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company owed him for services. The payment by each to the other was effected by the company crediting the services on the stock. Was it necessary for any purpose, that the ceremony of paying money by the company to the defendant, and by the defendant of the same money back again, should be gone through with? It seems to me not.

Concede the agreement to take pay for the ten per cent. in services as illegal and void, yet the services were actually rendered. The company could have resisted payment by setting up the illegal agreement. It was optional with the defendant whether he would pay anything on the stock; but he did pay by allowing a portion due him for services to be credited on the stock.

I think this was a ratification of the subscription, and a payment of the ten per cent.

The judgment should therefore be affirmed.

All the other judges being for affirmance, except SELDEN, J., who was inclined to reverse, judgment affirmed.

ROBERT YOUNG v. GUY DAVIS and others.

An order of the supreme court, setting aside a verdict as being against the weight of evidence, and on payment of costs, is not reviewable on appeal by this court.

It is the invariable practice of this court not to review orders made by the supreme court, granting new trials, on the ground that the verdict was either against evidence or against the weight of evidence.

Appeal from an order made at a General Term of the Supreme Court, affirming an order of the Special Term, setting aside a verdict and granting a new trial on terms, on the ground that the verdict was against the weight of evidence.

N. B. Smith, for the appellant.

Gardner & Burdick, for the respondents.

DAVIES, J. This action was commenced to recover the amount of a promissory note. The defense was usury. The action was tried at the Onondaga circuit, in October, 1858, and a verdict rendered for the plaintiff. No exceptions were taken to the charge by either party, and subsequently the judge who tried the case, upon the minutes, set aside the verdict and ordered a new trial. On appeal this order was affirmed at the general term, and the plaintiff now appeals to this court, and stipulates, if the order is affirmed, that judgment absolute may be rendered. The verdict was set aside as being against the weight of evidence, and on payment of costs by the defendants. Such an order is not reviewable, on appeal, by this court, and we have frequently so decided. The appeal presents no question of law for the determination of this court. A review of the correctness of the order made at the special term granting the new trial, on the ground that the verdict was

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against the weight of evidence, would necessarily involve an examination of such evidence by this court. In *Oldfield v. New York and Harlem Railroad Company* (14 N. Y. Rep. 310), we said that the question of setting aside the verdict as against the weight of evidence was properly addressed to the supreme court, which could reverse the judgment and grant a new trial on those grounds. But this court has no such power. It is invariably our practice not to review orders made by the supreme court granting new trials, on the ground that the verdict was either against evidence, or against the weight of evidence. In the present case no question of law is presented upon the admission or rejection of evidence, or the charge or refusal to charge of the judge, but the question is simply whether the order made by him granting the new trial upon terms as against evidence, was or was not properly made. His action in that regard is not subject to review in this case in this court.

MULLIN, J., also read an opinion in favor of dismissal. And all the other judges concurring, and agreeing that the judgment was right on the merits, appeal dismissed.

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JOSEPH RIPLEY v. THE ÆTNA INSURANCE COMPANY.

When at the time of applying for insurance, a paper, called in the policy a survey, is filled out by the applicant, and delivered to the agent of the insurer, and the policy expressly refers to such survey, and makes it a part of the policy, any representation contained therein is to be deemed a warranty.

And if the statements contained in such survey are to be considered promissory, rather than an affirmative warranty, yet the rights and duties of the parties are not altered. If the promise has not been kept—the condition precedent performed—the insurer is not bound by the policy.

Rules for construing policies of insurance.

A policy of insurance was based on a written survey, in the form of question and answer. To the question whether there was a watchman in the building during the night, the assured answered, "there is a watchman nights." The fire occurred between three and four o'clock in the morning, on Sunday, when no watchman was present. And it appeared that by the custom of the mill no watch was kept from twelve o'clock Saturday night to twelve o'clock Sunday night. *Held*, that the answer, "there is a watchman nights," was to be understood to mean that there was a watchman in the mill every night.

Held, also, that evidence of a custom of factories in the vicinity of the one insured, not to keep a watch from twelve o'clock Saturday night till twelve o'clock Sunday night, should not be permitted to control the language of the survey.

That the answers to the questions in the survey must be interpreted according to the popular meaning of the language used.

Parol evidence cannot be received to control, explain or modify a warranty in a policy of insurance.

Accordingly *held* that evidence to show that the agent of the insurers was informed that a watchman was not kept in the building insured from twelve o'clock Saturday night till twelve o'clock Sunday night, was improperly received by the judge, and should have been rejected.

And it being conceded that no watch was kept from twelve o'clock on Saturday night until twelve o'clock on Sunday night, it was *held* that the warranty was broken, and that the effect of the breach was to annul the policy, without regard to the materiality of the warranty, or whether the breach had anything to do in producing the loss.

A provision in a policy of insurance that no action shall be brought for the recovery of any claim upon it, unless the same shall be commenced within one year from the happening of the loss or damage, is valid and binding.

Such a condition may be waived, however, by the act of the parties. But a waiver, to be operative, must be supported by an agreement founded on

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a valuable consideration; or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.

Where the insurer on being applied to for the payment of a loss, under a policy containing such a condition, declined paying it, on the ground that actions had been commenced against it by other parties, which were still pending, and declared it would do nothing in reference to such loss while those suits were pending. *Held*, that this did not amount to a waiver of the condition; nor was the defendant estopped from insisting on the condition.

Appeal from the judgment of the general term of the Supreme Court of the first district, affirming a judgment in favor of the plaintiff at the Circuit, and from an order affirming an order denying a motion for a new trial made on the judge's minutes, at the Circuit.

THE action was upon a policy of insurance issued by the defendant upon the factory building, and the stock and goods therein, of the Glendale Woolen Company, a corporation located and doing business at Glendale, in the state of Massachusetts. The defendant is a corporation duly organized, and located and doing business at Hartford, in the state of Connecticut. The policy is dated the 11th of September, 1848, and expired on the 11th of September, 1849, and was for the sum of \$12,500.

The application for insurance was made to Plunkett & Hurlburt, who resided at Pittsfield, in Massachusetts, and who acted as agents for the Protection Insurance Company of Hartford, as well as for the defendant. It was the practice of their agents, when an application was made for a greater amount of insurance than either of said companies would assume, to make a single survey and send it forward to one of said companies, and the companies which would assume shares of the risk would agree on the amount of premium, and the portion each would assume. Plunkett, in pursuance of the request of one of the directors of the Glendale Manufacturing Company, called at the factory, examined the same, and left to be filled up and returned to him a printed blank, containing questions to be

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answered by the officers of said company. This paper, when the answers were given, is called a survey. Amongst other questions in said paper to be answered, and which were answered, were the following: "Is there a watchman in the mill during the night? Is there also a good watch clock?" To which the following answers were returned, viz: "There is a watchman nights—no clock; bell is struck every hour, from eight P. M. till it rings for work in the morning." Question: "Is the mill left alone at any time after watchman goes off duty in the morning till he returns to his charge in the evening?" Answer: "Only at meal times and on the Sabbath, and other days when the mill does not run."

The survey containing the foregoing questions and answers was forwarded by said Glendale Company to Plunkett & Hurlburt, and by them to the Protection Insurance Company of Hartford. Negotiations were had between said Protection Insurance Company, the said agent, and the defendant, by which it was arranged that, of the whole sum proposed to be insured, the said defendant should take \$12,500, and the Protection the rest, at a premium mutually agreed upon.

The policy issued by the defendant contained the following clause in reference to said survey, viz: "These premises are more fully described in survey No. 83, on file in the Protection office with Plunkett & Hurlburt's returns, which survey is made a part of this policy." Annexed to said policy was the following, amongst other conditions in reference to which it was declared in the policy, that the said policy was made and accepted, to wit: "It is furthermore hereby expressly provided that no suit or action of any kind against said company for the recovery of any claims upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur, and in

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case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

On Sunday morning, the 8th of April, 1849, the said factory, and its contents, were destroyed by fire; after which notice of the loss, and proofs thereof, were delivered to the defendant, in conformity with the provisions of said policy.

The defendant sent an agent to inquire into the facts concerning the fire, and then for the first time, as it was claimed by the defendant, did it learn that no watchman was accustomed to be in said factory from twelve o'clock on Saturday night till twelve o'clock on Sunday night; and the fire occurred while no watchman was in the building. The defendant refused to pay the loss, on the ground that answers in the survey to the questions, in regard to a watchman in said factory, above set out, were a warranty, and it had been broken, and the company was not, therefore, liable on said policy.

After the expiration of sixty days from the presentation of the proof of loss, the agents of the insured applied to the defendant for payment of the loss, which was at that time declined, on the ground that actions had been brought by several parties—one against said Glendale Company, and others against other parties interested in the stock of said company—claiming whatever might be payable on said policy; and the defendant would do nothing in reference to said loss while suits were pending. Said suits were never disposed of. Subsequently, the defendant refused to pay anything toward said loss, on the ground that the warranty hereinbefore referred to was broken. Negotiations between the parties were continued, for compromise and payment, without arriving at any results.

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Finally, before the end of a year from the loss, an action was commenced in Connecticut against said defendant, on said policy; which suit was subsequently withdrawn, after the decision in the court of errors of Connecticut in an action on the policy issued by the Protection Company, in favor of said company, on the ground that the warranty was broken and the company not liable on the policy.

This action was commenced in December, 1852. The plaintiff, in his complaint, after setting out the issuing of the policy, the destruction of the property by fire, and the furnishing of proof of loss, &c., and the refusal to pay on the ground that the questions and answers in the survey constituted a warranty, and that it was alleged to have been broken, proceeds to allege, on information and belief, that said questions and answers were not understood by either of the parties to be—and were not in fact—a warranty; and that said policy was procured through Plunkett & Hurlburt, agents of the defendant, who, before said policy was issued, had notice and well knew that it was the invariable practice of said company to have no watchman in the mill from midnight after Saturday to the following midnight, and that it was the intention of the agents of both parties to frame the questions and answers so as to convey that idea; and if the true construction of the language was otherwise, it was so expressed through mistake. Judgment was demanded for the whole sum insured.

The defendant, in its answer, after admitting some and denying others of the allegations in said complaint, set up by way of affirmative defence, 1st. The breach of the warranty; and 2d. That the suit was not brought within one year from the date of the loss.

On the trial, the questions principally litigated were, 1st. Whether the defendant's agent, Plunkett, was informed at the time he made the examination of the factory premises, before said survey was made out, that no watch was kept in said factory from midnight after Saturday until the

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midnight following, upon which there was conflicting evidence. The plaintiff was permitted to prove, under objection by the defendant, that it was the custom of mills in that region of country not to keep a watch during the time mentioned, and when Sunday began and ended by the custom and usage of the people.

The second question was, whether the limitation of one year for bringing the suit had been waived; and the act of waiver relied upon mainly was the refusal to pay until the garnishee suits, so called, were ended; and that as said suits were not ended within the year, the condition of the policy was waived; and that negotiations for compromise were continued between the parties even beyond the year. On this point there was a conflict of evidence.

The defendant, after the evidence was closed, moved to dismiss the complaint, on the following grounds:

1. The limitation as to the time for bringing an action on the policy, to one year, was valid and binding.
2. That no waiver thereof had been proved.
3. That breach of the warranty discharged the defendant from the obligation to pay said loss.

The court denied the motions; holding that the question of waiver was one for the jury, and that by the true construction of the question and answer as to the watchman, the insured were excused from keeping a watch from twelve o'clock, Saturday night, to twelve o'clock, Sunday night; to which rulings and decisions the defendant's counsel excepted. The defendant's counsel requested the court to charge the jury:

1. That they should find a verdict for the defendant on the question of waiver of the limitation of the action.
2. That inasmuch as a suit was in fact commenced within a year, the acts of the defendant in reference to the commencement or non-commencement of an action is wholly immaterial.
3. That the letter of the defendant's attorney to the

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assured of 7th of August, 1849, refusing to recognize the existence of any claim for loss on the policy, put the insured on their guard, and imposed on them the duty of bringing an action.

4. What was done after suit brought in Connecticut cannot be considered in determining the question of waiver.

5. That the recovery must be limited to \$10,000, being the loss on the property of the Glendale company.

The court refused so to charge, and the defendant's counsel excepted.

The court, amongst other things, charged the jury that if the defendant suggested a postponement until certain attachments were removed, and at the same time was silent in regard to the limitation, this would be a waiver. And that they should determine whether there was any positive act of the defendant which was intended to induce, and did induce the insured to postpone the suit until after the expiration of the year. To each of which instructions the defendant's counsel excepted.

The jury found a verdict for the plaintiff for \$15,150, and found the loss on stock insured to be \$3,787.50, for which sums judgment was rendered. And the same was affirmed by the general term. (See 29 Barb. 552, S. C.)

George F. Comstock, for the appellant.

I. The eighth question in the survey, with the answer thereto, constituted a warranty, which required a watch to be kept during all the nights of the week. The breach of this warranty vitiated the policy, and discharged the defendant. The contrary doctrine having been held at the trial, the judgment should be reversed on this ground. (*Glendale Company v. Protection Insurance Company*, 21 Conn., 19; *Houghton v. Manufacturers' Insurance Company*, 8 Metc. 114; *Farmers' Insurance Company v. Snyder*, 16 Wen. 481; *Alston v. Mechanics' Insurance Company*,

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4 Hill, 330; *Jennings v. Chenango Insurance Company*, 2 Denio, 75; *Kennedy v. St. Lawrence County Insurance Company*, 10 Barb. 285; *Wall v. Howard Insurance Company*, 14 Barb. 383; *Gates v. Madison County Insurance Company*, 2 Comst. 43; *Wilson v. Herkimer County Insurance Company*, 2 Selden, 53; *Wood v. Hartford Insurance Company*, 13 Conn. 533.)

II. The provision in the policy that no suit should be sustained against the company to recover for a loss unless commenced within twelve months, is entirely consistent with public policy, and is valid. (*Gray v. Hartford Insurance Company*, 1 Blatch. 280; *Wilson v. Ætna Insurance Company*, 27 Vermont, 99; *Williams v. Vermont Insurance Company*, 20 Vermont, 222; *Leadbeater v. Ætna Insurance Company*, 1 Shepley, 267; *Worsley v. Wood*, 6 Tenn. R. 718.)

III. This suit was not brought until nearly four years after the loss, and therefore it cannot be maintained. The court at the trial erred in submitting to the jury the question whether the limitation clause in the contract had been waived or discharged. There was no evidence having the slightest tendency to establish such waiver.

1. No doubt the parties might agree with each other, before or after the loss, to strike from the contract the clause in question. But it is not pretended that any such agreement was made, nor even that the clause was ever mentioned, considered or thought of in any written or oral intercourse between them at any time subsequent to the making of the policy. Consequently there is no waiver arising out of anything in the nature of a mutual stipulation, having by itself the force of a contract. As nothing of the kind ever took place it is unnecessary to speak of the absence of a consideration for any such agreement or stipulation.

2. There was no language or conduct on the part of the defendant intended or calculated to mislead the insured party, or which was accepted by such party, as an induce-

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ment to postpone the commencement of the suit until after the twelve months. The contrary is exactly the truth. (a.) When only two and a half of the twelve months had elapsed, the secretary of the insurer both said and wrote to the insured that certain garnishee suits ought to be removed before negotiating, &c. This suggested no postponement of suit, certainly none beyond the twelve months. (b.) But the defendants immediately after took ground against the claim, and formally announced their determination on the 7th of August, 1849, when only four of the twelve months had elapsed. (c.) The insured party accepted this announcement as decisive, and actually commenced suit in September, 1849, before six of the twelve months had elapsed. (d.) If any thing took place afterwards which can be called negotiation, manifestly it could have nothing to do with the limitation of time for bringing a suit already commenced.

IV. The court not only submitted the question of waiver to the jury, but specially charged as follows: "In the language of the general term, if the defendants suggested a postponement until certain attachments were removed, and at the same time were silent in regard to the limitation, I am bound by this decision to charge you that this would be a waiver." This was erroneous, because it instructed the jury not to deliberate upon the matter of fact and intention, but peremptorily to find that the limitation was waived. The only evidence to which this part of the charge could refer was that of Goodrich, showing that in June, 1849, Mr. Loomis, the secretary of the defendant, declined to pay the loss when called upon so to do, and stated as a reason that garnishee suits were pending which ought to be disposed of before negotiating concerning the claim. This was nine and a half months before the expiration of twelve months from the time of the loss. This not only was not in law a waiver of the limitation, but it would not authorize a jury to find such

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waiver. That it was not a waiver is still more apparent when it is considered that soon afterwards, (August 7th, 1849,) the defendant peremptorily rejected the claim, and that a suit was actually brought upon it before half the period of limitation had expired.

D. D. Field, for the respondent.

I. The first and most material question in this case is the true meaning of the survey. Whether the reference which the policy makes to that survey renders it a warranty or merely a representation, is a question not raised upon this record; though the plaintiff has always insisted and does still insist that the survey is referred to merely for a description of the premises, and its answers about the workings of the mill are not warranties. But, as that is not a question here, no further reference will be made to it. What is the true meaning of the questions and answers taken together? Do they import that the watchman was to be in the mill during any part of Sunday? If they do, the court below was wrong. If they do not, it was right. The defendants' construction rests upon the single word "nights," which they insist must mean the total period of obscurity during the entire year, from the twilight of the evening to the twilight of the morning of every twenty-four hours, from the 1st of January to the 31st of December. The plaintiff, on the other hand, insists that the word *nights*, taken by itself, has not so comprehensive a meaning; and especially that, taken in connection with the rest of the answer, it is plain that it does not cover the hours of darkness in the Christian Sabbath.

1. The word "nights," in ordinary speech, does not signify the whole of the night-time. When we speak of a person's calling obliging him to be out nights, we do not mean that he is obliged to be out all night. The physician is compelled to be up nights, the soldier and the sailor to

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keep watch nights; but none of them is kept awake during the whole period of darkness. The same word occurs again in the answer to the fifteenth interrogatory, where it would be absurd to suppose it meant all the time of night. On both occasions on which it is used, the word is something equivalent to "o'nights," or "at night," or "after dark," or any other expression which refers to the night-time in general, as distinguished from the day-time.

2. The answer does not follow the language of the question. That was, "Is there a watchman in the mill during the night?" this, "There is a watchman nights"—an answer which certainly should suggest to the person receiving it that the person making it did not mean to warrant that there should be a watchman who should stay in the mill during every hour of every night. One of two things seems evident: either the person answering understood the question to be broader than the answer, and meant to give an answer which fell short, or, what is the more probable, he understood both the question and the answer to have the same restricted meaning.

3. If the word "nights" were far more comprehensive than it is, the context and other parts of the survey would limit it.

(a.) The eighth interrogatory consists of two parts, which following each other without a break, would read: "Is there a watchman in the mill during the night, and if so, is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening?" The answers then, put into one, might be read thus: "There is a watchman nights; but the mill is left alone on the Sabbath and other days when it is not run, and it is also left alone at meal times of the day when it is run." The interrogatory assumes of course that there is no watchman when the mill is left alone; and the answer is explicit that the mill is left alone every non-working day and every meal time of every working day. There would

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thus be half an hour, or perhaps an hour, every morning, every noon, and every evening, with the fires in full blast and the materials disposed about the building for use, when not a single person, workman or watchman would be in the mill. The defendants' construction would require a watchman to come to the mill every evening and stay all night, though the mill should be stopped for a month, or for even half the year.

(b.) The answer to the inquiry about a watch-clock indicates that the watchman comes at 8 P. M., and stays till he rings the bell for work in the morning; for the object of a watch-clock is to insure the fidelity of the watch, and the mention of the bell is introduced to give this assurance of his fidelity, that he is obliged to be on hand and wakeful during every hour between the designated limits. When the answer adds, "No clock; bell is struck every hour from 8 P. M. till it rings for work in the morning," it plainly shows that the person who made it did not intend to apply it to the night preceding Sunday; for no work was done on Sunday, and no bell would be rung on the morning of that day. Taking the whole answer together, it is plain that "nights" does not cover the entire night preceding Sunday. This construction is supported by the next language of the same question and answer, which were as follows: "Q. Is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening? A. Only at meal times, and on the Sabbath and other days when the mill does not run." To the person who made the former answer, the words "after the watchman goes off duty in the morning" would mean after the "bell has rung for work in the morning" (to use the language of his former answer), which, of course, would refer only to working days, and would exclude Sundays. His answer is, therefore, "only at meal times" (on working days). He adds the rest of his answer with reference to the understanding with which he had

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answered the former question; for as he plainly did not intend to apply that to the night preceding Sunday, so, when he is asked whether the mill is ever left alone after the watchman goes off duty in the morning—that is, on those days when the bell rings for work in the morning, or on working days—he naturally adds, after the proper answer to the question, “on the Sabbath and other days when the mill does not run,” meaning, that as these were not working days “when the watchman went off duty in the morning,” the former part of his answer did not apply. On the Sabbath and other holidays, he says, the mills were left alone, but not from any hour when the watchman went off duty in the morning; for he went off duty when the bell rang for work, and that was an incident only of working days. The watchman’s going off duty in the morning evidently did not apply in his mind (and so he meant to express it) to Sundays and holidays.

(c.) The word “Sabbath” means all the time between twelve o’clock Saturday night and twelve o’clock Sunday night. At common law, the day begins and ends at midnight; and that is the rule in this country, except in those states where the day is otherwise defined by statute or usage. To this point, and as to the meaning of Sunday, see *Butler v. Kelsey* (15 Johns. 177); *Pulling v. The People* (8 Barb. 385).

(d.) The rest of the answer is to be understood with qualifications, for the bell does not ring every hour on Sunday. The next answer showed that the mill was left alone on Sunday. The questions were asked with reference to the days of work, and the danger of working the mill.

(e.) The exception of the “Sabbath” was made in conformity with the habits of the community where the mill was situated. These forbid or discourage labor on any portion of the Sabbath; and to require one to watch a mill during that time, though it might be justified to them by necessity, would certainly be a departure from the ordinary

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habits of their society. This circumstance, while it might not control, would serve to indicate the sense in which the language was used and understood.

(f.) The answer to the ninth interrogatory gives another instance of the context qualifying a particular expression. The inquiry is "whether the waste is removed daily," and the answer is in the affirmative; and yet, unquestionably, neither the person asking nor the person answering understood by this that the waste was to be removed on the Sabbath.

(g.) The fifteenth question and answer give still another instance. The inquiry is, "during what hour is the factory worked?" and the answer is, "summer, commence at 5 o'clock A. M., work till dark; winter, commence as soon as we can see in the morning, work till 8 o'clock P. M., etc." In neither is there any exception of the Sabbath or holidays; and yet it is certain that neither of the parties understood that the work was to begin in the morning and end in the evening of those days.

(h.) The sixteenth interrogatory asks about the fires "when the work ceases at night;" and yet it is plain that this refers not to the beginning of the darkness, as the strict interpretation of the word "at night" would make it, but to any hour during the night when the work ceases.

4. The transaction bears evidence, throughout, that the solicitude of the insurers was about the exposure arising from the working of the mill. A factory lying idle is no more exposed than any other building, and would no more require watching, or justify a larger premium for insurance. The defendant's construction, however, would require a watchman every night, if the dam should give way and the business be suspended for the greater part of the year. If, on the other hand, it be conceded, as it should be, that, in such an event, there would be no need of watching the mill, the accuracy of the plaintiff's construction, respecting the watching on Sunday, is demonstrable. If, for example,

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the 4th of July had happened to fall on Saturday, the fires would have been extinguished Friday evening; and the watchman need not have come Saturday evening, or been there during any part of the darkness between Saturday evening and Sunday evening. But the defendant's construction would require the watchman to stay till daylight Saturday morning, and to come again at twilight on Sunday evening, though he might stay away the whole intermediate period. Or, suppose the mill stopped for the whole summer season, beginning on the last day of June and ending on the last day of August, the defendant would have the watchman stay till daylight of the first of July and come again at twilight on the last of August. For the reasons thus given, the plaintiff submits that the court below was right in its ruling, "that, by the true construction of the eighth question and answer in the survey, the insured were excused from keeping a watch from twelve o'clock Saturday night to twelve o'clock Sunday night." For a case in some respects similar, see *Prieger v. Ex. Ins. Co.* (6 Wis. 89.) The plaintiff's counsel has not thought it necessary to discuss particularly the decision of the court in Connecticut, reported in 21 Conn. 19. That decision is not authoritative, and certainly is not entitled to greater respect than that of the supreme court of this State. The contract of insurance was not made in Connecticut, but in Massachusetts. Even if it had been made in the former State, as the question is one merely of the meaning of ordinary language, the court there would have no especial jurisdiction to explain it.

II. The next question concerns the limitation contained in the thirteenth of the conditions annexed to the policy. On this point the plaintiff claims:

1. That the condition was void as against the policy, if not the very terms, of the law.

2. That, if it was a valid condition, it was for the benefit of the insurers, and might be waived by them.

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3. That the court below was right in its instructions to the jury respecting the evidence of waiver.

The condition was that no suit for the recovery of any claim under the policy should be sustainable in any court of law or chancery, unless commenced within twelve months after the loss; or, if any suit was brought after that period, the lapse of time should be deemed conclusive evidence against the validity of the claim. In this state the question must be regarded as an open one, notwithstanding what was said in *Ames v. New York Union Ins. Co.* (14 N. Y. 266), since that was not necessary to the decision of the case. In other states the decisions are conflicting, though the preponderance is undoubtedly in favor of the validity of the condition. It has been held valid in Ohio (*Portage Insurance Co. v. West*, 6 Ohio U. S. 599); in Georgia (*Brown v. Savannah Insurance Co.*, 24 Geo. 97); in Pennsylvania (*N. W. Insurance Co. v. Phoenix O. and C. Co.*, 31 Penn. 448); in Rhode Island (*Brown v. Roger Williams Insurance Co.*, 5 R. I. 394); in Massachusetts (*Fullam v. N. Y. Insurance Co.*, 7 Gray, 6; see also *Armstrong v. Bowditch M. F. Insurance Co.*, 6 Gray, 596); in Vermont (*Williams v. Vermont Insurance Co.*, 20 Vt. 222; *Wilson v. Ætna Insurance Company*, 27 Vt. 99); in Maine (*Leadbeater v. Ætna Insurance Co.*, 1 Shepl. 267); in Tennessee (*Wisely v. Wood*, Tenn. 718); and by Mr. Justice NELSON, in *Cray v. Hartford Insurance Co.* (1 Blatch. 280). It has been held invalid in Indiana (*Eagle Insurance Co. v. Lafayette Insurance Co.*, 9 Ind. 443), and by Mr. Justice McLEAN, in *French v. Lafayette Insurance Co.* (5 McLean, 461). We are thus at liberty to discuss the question upon principle. The objection to the condition is that it is repugnant to the fair construction of the statute of limitations; or, if not thus repugnant, it imposes a restraint upon the assertion of a right in the tribunals of the country not imposed by the law of the land. Our statute declares that "civil actions can only be commenced

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within the period prescribed," &c. (Code, § 74), and that "the periods prescribed in section seventy-four for the commencement of actions other than for the recovery of real property shall be as follows," &c. (§ 89.) If the language had been, civil actions can be commenced within the periods prescribed, and those only, there would have been a clear repugnance between the statute and the condition in question. Is the repugnance less real because the language of the statute is a little different? Is not the language indeed equivalent to a declaration that actions may be commenced within the prescribed periods, and not after? But, independent of this consideration, the attempt to impose a restraint on the assertion of a right not imposed by law should seem not to be defensible. If it may be done in one respect, there seems to be no sufficient reason why it may not be done in another. Thus parties might, with equal propriety, stipulate that no suit should be brought but in the name of the insured; that no attachment, injunction, or other provisional remedy should be obtained in such suit; that the defendants might answer without oath; that a jury-trial should be waived; that a reference should in all cases be agreed upon; that particular referees should be selected; that execution should issue only after a certain time, or upon certain conditions, and the like. It has been said in some of the courts (*Nute v. Hamilton Insurance Co.*, 6 Gray, 174; *Hall v. People's Insurance Co.*, 6 Gray, 185; *Cobb v. New England Insurance Co.*, 6 Gray, 192), that a stipulation not to sue in a particular court, which is admitted to be void, differs in this respect from the stipulation as to the time of suing. The effect, however, of the stipulation as to time is to drive the insured into a particular court. Thus the defendant is a foreign corporation. A suit against it in this state cannot be brought unless the insured is fortunate enough to find property here to attach. What is the party then to do but seek the corporation in the state where it was

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created, though it contracted the obligation, and the cause of action accrued elsewhere? Again, this court has held that the statute of limitations does not run at all against a foreign corporation. (*Olcott v. Tioga R. R. Co.*, 20 New York, 210.) Here, however, is a limitation stipulated by the corporation, which over-rides the rule. For these reasons it is submitted that the condition is not valid. But, if it were valid, it could be waived, because it was for the benefit of the insurer. Even a constitutional right may be waived. (*Lee v. Tillotson*, 24 Wend. 337; *Baker v. Bra-man*, 6 Hill, 48.) There is more reason why the conditions of a private contract should be waived. The language of the courts on this point is decisive. (*Ames v. New York Union Ins. Co.*, 14 New York, 253.) What will amount to a waiver must depend upon the circumstances of each case. This rule, however, may be safely laid down, that any act or declaration of the insurer which misleads the insured, or induces him to wait for any period whatever, is inconsistent with good faith in afterwards insisting upon the limitation, and is therefore a waiver of it.

III. The two preceding points cover the principal questions in the cause. The remaining questions are subsidiary and incidental. One of them is this: Was the evidence which was received in the earlier stages of the trial, touching the understanding of the parties upon the subject of a watch erroneously received; and if so, is it a cause for a new trial? The plaintiff claims that the evidence was proper in itself when given, and that its becoming afterwards immaterial did not make it erroneous to have received it. The theory of the plaintiff's case was, that the survey did not really mean what the defendant claimed; but that if it did, it was a mistaken expression, which misled nobody, and should now be corrected. He was bound to give his whole evidence before he rested, and the judge was not bound to declare the law till the evidence was closed on both sides. If, therefore, the evidence would have been

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proper on the supposition of a mistake, it was proper when given. To hold the contrary would make it necessary to reverse the order of a trial. Either the judge must declare at the outset how he means to charge the jury, or the plaintiff must be permitted to give evidence applicable to either aspect of his case, if it happen to have two aspects.

IV. The first exception was properly overruled. It was competent for the plaintiff to claim payment for the loss, either on the ground that the policy, as it stood, was to be interpreted according to his view, or that if interpreted otherwise, it was mistakenly expressed, and should therefore be reformed. There is nothing inconsistent in the claim; the code allows it, and so this court has repeatedly decided. (*Emery v. Pease*, 20 N. Y. 63; *New York Ice Company v. N. W. Insurance Company*, 23 N. Y. 357; *Barlow v. Scott*, 24 N. Y. 40.) The expression of the plaintiff's counsel, that the proposed evidence was to be adduced "as to the mistake in the policy," is to be explained by reference to the language of the pleadings. The complaint averred, that it was the intention of both parties to the insurance to express the idea that it was the invariable practice of the company insured to have no watchman in their mill from midnight after Saturday to the midnight following; and that if the true construction of the language of the policy was different, the expression used was employed only by mistake. All these allegations were directly put in issue by the answer. The evidence proposed by the plaintiff was offered to support these averments; in other words, to show, either that the construction relied on by the plaintiff was the true one; or that if it was not, then the language was employed only by mistake. In either of these aspects, the evidence was competent and admissible.

1. It was competent in support of the construction which the plaintiff claimed as the true one, on the principle that

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extrinsic parol evidence is admissible to explain an ambiguous or uncertain writing. The defendants claimed that the questions and answers constituted a warranty on the part of the company, that they would keep a watchman in their mill through the hours of every night in the week, from 8 P. M. to the usual hour of commencing work in the morning. The plaintiffs, anticipating this defence, aver that it was the intention of both parties to the insurance to convey by these questions and answers, the idea that there was "no watchman in the mill from the midnight after Saturday to the midnight following." When the parties to a contract differ in respect to the true interpretation to be given to their language, and especially when this language is in any respect indeterminate or uncertain, the court may and will resort to the evidence of surrounding and extrinsic circumstances and facts; not to vary or contradict the writing, but to explain it. (*Moore v. Meacham*, 10 N. Y. 211.) It was either the province of the court to decide which of the two constructions was the true one; or, if it did not think the import of the language itself to be certain and unmistakable, parol, extrinsic evidence of the surrounding circumstances was competent to explain the language, and so to aid in the construction of it. (*French v. Carhart*, 1 Comst. 102; *Blossom v. Griffin*, 13 N. Y. 573.)

2. If the court construed the language in question adversely to the plaintiff, the offered evidence was competent to show the mistake which he had averred in his complaint, and which the defendant had traversed in his answer. (*Bartlett v. Judd*, 21 N. Y. 200; *Kent v. Manchester*, 29 Barb. 595; *Leavitt v. Palmer*, note, 3 N. Y. 19; *Marvin v. Bennett*, 26 Wend. 169; *Gates v. Green*, 4 Paige, 355; *New York Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357.)

3. It was not a valid objection to the evidence that "the complaint did not * * * ask leave to reform the policy." It was competent for the court to reform the policy, if it were necessary, even though relief of that kind was not

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asked in the complaint. Under § 275 of the code, whenever the defendant has answered, the court may grant any relief consistent with the case made by the complaint, and embraced within the issue. In such a case, the particular demand of relief becomes immaterial. (*Marquat v. Marquat*, 2 Kern. 341; *Jones v. Butler*, 30 Barb. 641; And see *Anon.* 11 Abb. 233.)

4. But if there was any force in the defendants' objection, it was obviated by the subsequent action of the court, in its adoption of the plaintiff's construction.

V. The defendant's objections to proof of the custom in respect to watching mills on the Sabbath were invalid, and his exceptions to the admission of such evidence must fail. The evidence of the custom, at the time of the negotiation for insurance, was admissible, because, if proved, this was one of the circumstances attending the contract, and explaining the language in which it was contained. Whether the custom alleged was a general or a local one, proof of its existence was certainly admissible. The pleadings had, moreover, distinctly made and traversed the allegation, "that the defendant knew that it was the invariable practice and custom of the company to have no watchman in the mill from the midnight after Saturday to the midnight following."

The defendant's third and fifteenth exceptions must fail. The question of the admissibility of evidence to prove intention is one of relevancy merely. Under the pleadings in the case, it was competent for the plaintiff to show mistake, and for the court to grant relief against it. And when it is competent for a person, who seeks equitable relief against mistake, to prove that a writing does not truly express his intention, proof of that intention is of course relevant. But the court sustained the plaintiff's construction of the survey; and therefore, even if the evidence should have been excluded, the objection was rendered immaterial.

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MULLIN, J. Much evidence was given on the trial for the purpose of reforming the application for insurance, so that the answers to the questions in regard to the keeping a watchman in the factory should be made to express the understanding of both parties on that subject. But, inasmuch as the learned justice who tried the cause held that the application needed no reformation; that, by its terms, the insured were not bound to keep a watchman in the factory from twelve o'clock on Saturday night until twelve o'clock on Sunday night; the case is relieved of the questions raised on the trial, as to the competency of the evidence given for the purpose of procuring a reformation of the contract, and whether a case was made by the evidence that would have entitled the plaintiff to that relief.

Before proceeding to ascertain what the construction of the clause of the application under consideration is, it is important to know whether it is a warranty or a representation merely.

The paper which contained the questions and answers in regard to keeping a watchman in the factory is called, in the policy, a survey, and this survey is expressly referred to in the policy and made a part of it.

Angell, in his work on Fire and Marine Insurance, defines a warranty as being a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy although it may be written on the margin, transversely, or on a subjoined paper referred to in the policy.

What is said on the subject of a watch in the factory is contained in the survey, filled out by the insured and delivered to the agent of the insurer, and the policy refers to and makes this survey a part of itself. It is, therefore, clearly within the definition of a warranty as laid down by the learned author of the treatise cited, as well as that given by our own courts to that term. (*Jefferson Insu-*

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rance Company v. Cotheal, 7 Wend. 73; *Brown v. Oataraugus Ins. Co.*, 18 N. Y. 385; *Chase v. Hamilton Ins. Co.*, 20 id. 52.)

If at the time the survey was made the factory was not in operation, and the statements contained in it as to the watch kept therein is to be considered promissory rather than an affirmative warranty, yet the rights and duties of the parties are not altered. If the promise has not been kept—the condition precedent performed—the insurer is not bound by the policy. (Angell on Insurance, § 145; 2 Duer Ins. 749; 1 Arn. 502.)

The clause of the survey being a warranty, it then becomes important to ascertain its construction, in order to determine whether it has been broken. In construing contracts of insurance, effect must be given to the intention of the parties, as in the construction of all other contracts.

The rule is very clearly stated by Lord ELLENBOROUGH, in *Robertson v. French* (4 East, 135). The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz: that it is to be construed according to its sense and meaning as collected, in the first place, from the terms used in it, which terms themselves are to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same word, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

It was of the highest importance to the insurer, in order that it might be able intelligibly to decide whether it would assume the risk, or, if it assumed it, to fix the premium to be charged, to know whether a watch was kept in the factory proposed to be insured, at what time such

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watch was kept, and the means, if any, of determining whether he discharged faithfully his duty. The question "Is there a watchman in the mill during the night?" was a very significant one, and the answer, "There is a watchman nights," was a full response to the inquiry. A watch clock being constructed so as to require the watchman to be at it each hour, or his absence would be discovered in the morning, the question whether there was a watch clock was also a very significant one. Their answer was, there was no clock, but the bell was struck every hour, from eight P. M. until it rang for work in the morning, furnished perhaps the next best means of securing watchfulness on the part of the watchman.

The next question to which an answer was required is: "Is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening." To which it was answered: "Only at meal times, and on the Sabbath and other days when the mill does not run."

Fires in the factory might be produced in either of four modes: From fire used in the building, from the friction of the machinery, spontaneous combustion, and by an incendiary. There was no danger from fire used in the building, when the building was not occupied, except for a few hours after each day's work closed, and until it was put out. Nor was there any danger from friction, unless the machinery was in motion; nor from incendiaries, unless when there was no person in the mill; but there was constant danger from spontaneous combustion. A watch in the factory during the night afforded a great security against injury from fire from any cause, in the night; and as the danger existed every night in the week, it was important to the insurers to know whether a watch was on hand every night.

It being important to the insurer to know whether a watch was kept every night, and the question put being

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general whether a watch was kept during the night, the answer that there is a watch nights, must have been understood to apply to every night. No exception being made in the question, and there being an obvious necessity for a watch every night, both parties must have understood the question and answer to apply to every night. If the insured intended to exclude any night, they should have done it clearly and distinctly. It was no more difficult to say that no watch was kept from twelve o'clock Saturday night to twelve o'clock Sunday night, than it was to exclude the Sabbath in the answer to the next question. And the fact that an exception was made in the next answer, is some evidence that none was intended to be made in the first.

It seems to me quite clear, that the answer "there is a watchman nights," is to be understood to mean there was a watchman in the factory every night. But evidence was given on the trial, of a custom of factories in that section of the country not to keep a watch from twelve Saturday night till twelve o'clock Sunday night, and that the answers are to be construed in reference to such custom. "A custom in order to become a part of a contract, must be so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established, and not casual—uniform, and not varying—general, and not personal, and known to the parties." (2 Parsons on Cont. 53; *Dawson v. Kittle*, 4 Hill, 107.)

Within the above rule it seems there was no such evidence as would authorize the court to find a custom amongst the factories in the vicinity of the one insured which should be permitted to control the language of the contract in question. The answers to the questions in the survey must be interpreted according to the popular meaning of the language used.

It is insisted by the defendant's counsel that the agent of

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the insurer was informed that a watchman was not kept in the factory from twelve o'clock Saturday night till twelve o'clock Sunday night, and, therefore, the case is to be considered as if the answers in question were in accordance with the verbal information. But it is well settled that parol evidence cannot be received to control, explain or modify a warranty in an insurance policy. (Angell on Ins. 143; *Jennings v. The Chenango Mutual Insurance Co.*, 2 Denio, 75; *Kennedy v. St. Lawrence Mutual Insurance Co.*, 10 Barb. 285.)

In the 2d Denio the court held that the rule which prevails upon sales of property—that a warranty does not extend to defects which are known to the purchaser—does not apply to warranties contained in policies of insurance; and that parol evidence that the insured truly informed the agent of the insurer who prepared the application as to the situation of the buildings, which differed from the statement in the application, is not admissible. The same propositions were restated in the case in 10 Barb. 285.

The question has been before this court, and I am unable to say what conclusion it has arrived at in reference to it.

In *Bidwell v. The Northwestern Ins. Co.* (19 N. Y. 179), it was held that when a marine policy stated the insurance to be on account of A., loss if any payable to B., and the vessel was warranted by the assured free from all liens, and B. held a mortgage on the vessel subject to two prior mortgages, the insurance was that of A., the owner, on the vessel, and not of B. upon his interest as mortgagee of A.'s equity of redemption; and that the prior mortgage was a breach of the warranty and fatal to the recovery. The answer admitted that the defendant was informed, when the application for insurance was made, of the interest of the mortgagee, and that the loss was made payable to him to secure his interest as mortgagee. The cause was again tried; there was a verdict and judgment for the plaintiff, which was affirmed at the general term, and again brought

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before this court, and it is reported in 24 N. Y. 302. I do not find that the facts are materially changed, although the learned judge says they were; yet from his summary of them it does not appear that the case was especially changed. It was nevertheless held that the existence of the liens constituted no breach of the warranty. And the dicta in the opinion go the length of utterly sweeping away all the distinctions which have been supposed to exist between warranties in policies of insurance and contracts of sale. If this court is at liberty to consider itself not bound by the decisions on this question, but that it may now establish a rule that it shall deem to be more wise and just, I am not prepared to say that the doctrine of the learned judge, in the case cited, is not the best. But I trust we shall adhere to principles which have been so long settled, and in conformity to which so many contracts have been made, and the abandonment of which will produce great injustice.

The doctrine of the case of *Bidwell v. The North Western Insurance Co.*, last referred to; may stand without interfering with the cases in 2 Denio and 10 Barb., above cited, and I do not think the principles of the case should be extended beyond the facts of that case.

If I am right in supposing that parol evidence cannot be received to vary the warranty in this case, then the evidence given on that point, and received by the judge, should have been rejected.

The next inquiry in order is: Has the warranty been broken? On this subject there is no dispute. It is conceded by the defendant that if the answer to the question as to the watchman cannot be construed as it was construed by the learned judge at the circuit, then it was broken because it is true that no watch was kept from twelve o'clock on Saturday night until twelve o'clock on Sunday night.

The effect of the breach of the warranty is to annul the

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policy without regard to the materiality of the warranty, or whether the breach had any thing to do in producing the loss.

The effect is very well stated by Marshall, in his work on Insurance, 249. He says: "A warranty being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose or with what view it is made, or whether the insured had any view at all in making it. But being once inserted in the policy, it becomes a binding condition on the insured, and unless he can show it has been literally performed, he can derive no benefit from the policy. The very meaning of a warranty is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed. * * * * With respect to the compliance with warranties, there is no latitude, no equity. The only question is: Has the thing warranted taken place or not. If it has not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of warranty."

I am unable to perceive any good reason why parties to a contract may not agree that an action for a breach of it shall be brought within a period shorter than that fixed for bringing an action, or that the right of action shall be deemed abandoned. So far from interfering with, it more effectually secures the end sought to be attained by the statute of limitations. This question was directly up in *Ames v. New York Union Insurance Co.* (14 N. Y. Rep. 253), and it was there held that such a condition in a policy of insurance was valid. Had it not been for the waiver of the condition in that case the action would have been barred.

But the plaintiffs meet this defense by alleging, and, as they claim, proving, that it was waived by the company,

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and the learned judge charged the jury that if the defendant waived this condition the action could be maintained. He further instructed them that if the defendant suggested a postponement until certain attachments were removed, and at the same time were silent in regard to the limitation, that would be a waiver. The circumstances to which the judge alluded in this part of his charge must be the letter of the defendant's secretary, of the 23d June, 1849. That letter was written in reply to a demand by the treasurer of the Glendale Company for pay of the loss, and it informs Mr. Taft, to whom it was written, that the defendant would not enter on any negotiation touching the claim until the garnishee suits mentioned in the letter were removed.

It seems to me that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.

There is not in this case any agreement to waive the condition requiring the suit to be brought within a year; nor is the defendant estopped from insisting on the condition.

If my tenant agrees to pay me rent on a day named, or his lease will be forfeited, and if before the day I agree, for a valuable consideration, to waive the condition, I am bound by the agreement. If, without consideration, I agree that he may pay after the day, and he, by reason thereof, omits to pay at the day, I am estopped from enforcing a forfeiture. But if, without consideration, I assent to a waiver of payment at the day, but before the day withdraw my assent, and insist on performance in such season as to enable him to perform, I am not estopped. Nor was the defendant in this case estopped, even if the above letter, or the negotiation between the officers of the factory and the insurer, could be considered as a waiver of the condition.

But I can find nothing in the evidence which would jus-

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tify the inference that either party understood at the time there was a waiver. The letter of the 7th August must have removed any impression of the sort from the minds of the officers of the factory company. By that letter they were distinctly informed that the defendant would not recognize any claim against it under the policy, or upon any matter connected therewith. And what is entirely conclusive upon the subject, the factory company, within the year, commenced their action in Connecticut, thus demonstrating, in the clearest possible manner, that they did not then suppose the defendant had waived the condition.

In no aspect of the case am I able to discover any ground on which this action can be maintained. The judgment of the general term must be reversed and a new trial ordered, costs to abide the event.

All the judges concurring, on both grounds, judgment reversed.

Statement of case.

LEONARD BARTON v. SAMUEL W. FISK and others.

The plaintiff, claiming to be the owner of certain timber lying on the defendants' land, sued the latter, who also claimed to own the property, to establish his title. He procured a preliminary injunction, forbidding the defendants to assert their alleged ownership by suit in court, or in any other way, pending the principal suit. He failed in that suit, the court determining that the property belonged to the defendants, and not to the plaintiff. In the meantime the plaintiff carried off the timber, destroyed its identity, and disposed of and converted the proceeds to his own use. *Held*, that the measure of the damages which the defendants in the suit were entitled to recover, in an action upon the injunction bond, was *prima facie*, the value of the property in question.

Appeal from an order of the General Term of the Supreme Court, affirming one made upon the report of a referee appointed to ascertain the damages sustained by the defendants, by reason of an injunction order obtained by the plaintiff at the commencement of the action.

THE defendants were the owners of a lot of land in Cattaraugus county, on which was lying a quantity of logs, which had been cut on the lot by the plaintiff, or those under whom he claimed title. The plaintiff claimed to own the logs by virtue of an agreement between the former owner of the land, and certain persons who had conveyed their rights to him. The defendants denied that the plaintiff owned them, and asserted title in themselves as the owners of the land on which they were cut. The principal action was brought to establish the plaintiff's title to the logs. A preliminary injunction was obtained, by which the defendants, their agents, &c., were restrained from taking, using, drawing or interfering with the logs, from further prosecuting an action which the defendants had commenced against a person who had acted under the plaintiff's direction in carrying off some of them, and from commencing another suit against that person, or any other

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party who, under the plaintiff's authority, should carry off or use the logs or any part of them, and from doing any other act to prevent or hinder the plaintiff or his agents or servants from removing or using the logs. The undertaking of McCoy, the plaintiff's surety, was to the effect that the plaintiff would pay all damages, not exceeding five hundred dollars, which might be sustained by the defendants by reason of the injunction order, if the court should finally decide that the plaintiff was not entitled to the same. The principal action was tried before a referee, on whose report judgment was rendered against the plaintiff, dismissing the complaint on the merits, with costs. On the reference to ascertain the damages, it appeared that pending the suit the plaintiff had drawn away all the logs, and had converted them to his own use, by manufacturing them into lumber, and had made an assignment for the benefit of his creditors, and become insolvent. One Smith Barton acted for the plaintiff in drawing off the logs, and was his agent therein. It did not appear whether he was solvent or insolvent. The value of the logs lying on the ground was shown to be \$450, and the defendants' damages were reported at that sum. The plaintiff excepted to the report, and brought up the evidence taken before the referee by way of affidavit; but it was confirmed by the general term; whereupon this appeal was brought. It was submitted on printed arguments.

A. G. Rice, for the appellant.

D. H. Bolles, for the respondents.

DENIO, Ch. J. This seems to me a very plain case. The plaintiff claiming to be the owner of personal property lying on the defendants' land, sued the defendants who also claimed to own that personal property, to establish his title; and he procured a preliminary injunction forbid-

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ing the defendants from asserting their alleged ownership by suit in court, or in any other way, pending the principal suit; but he was finally beaten, the court determining that the property belonged to the defendants, and not to the plaintiff. In the meantime, while the defendants' hands were tied, the plaintiff carried off the property, destroyed its identity, and disposed of and converted its proceeds to his own use; and the question is what damages the defendants have suffered in consequence of this proceeding of the plaintiff. The object, and the effect of the injunction manifestly was to allow the plaintiff to carry off and dispose of the property, while the defendants, who were, as the event has shown, its owners, were precluded from doing anything whatever in court or out of court, to protect themselves in its possession. *Prima facie*, the value of the property which the defendants have lost, was the measure of the defendants' damages. If the property had remained specifically the same during the litigation, and at its conclusion had been within the defendants' reach, the damages probably would have been such as resulted from their being deprived of its use *pendente lite*, and from any depreciation in value. But under the existing facts it is the same thing as though it had been destroyed, while the owners were prevented from extending their hands for its preservation. The plaintiff's argument is, that the loss was not occasioned by the injunction, but by the tortious act of the plaintiff and his assistant, unconnected with that process. This is too narrow a view of the question. If it had been carried off and converted by a stranger while the owners were prohibited from doing anything to protect it, the persons who restrained them ought to make recompense for the loss. *A fortiori*, he should make compensation when he himself carried it off and converted it during the restraint which he had procured to be imposed. The efficient cause of the loss was the inability of the defendants, caused by the injunction, to take care of and preserve that

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which was their own. The argument which seeks to turn the defendants over to their remedy against Smith Barton, who aided the plaintiff in carrying off the logs, is equally ungracious and unfounded. That person would no doubt be considered a co-trespasser with the plaintiff, and would be liable to an action. But whether it would be fruitful in producing compensation or not, no one can say. It was not shown that he was pecuniarily responsible, and it may be that a judgment against him would be as valueless as one against the plaintiff. Before any consideration could be attached to the remedy against him, the plaintiff should have shown that he was able to respond for the consequences of the act which the plaintiff had, by means of the injunction, and by employing him in removing the logs, enabled him to perform. I am for affirming the order appealed from.

HOGEBROOM, J. This case presents the question of the proper damages to be allowed a party who is restrained by an injunction, proven by the event of the suit to have been improperly awarded. The plaintiff, claiming an equitable right to certain timber on lands in possession of the defendants, commenced this action to compel the defendants to release to him said timber with the right of removal, and to obtain an injunction to restrain the defendants: 1st. From cutting, drawing, taking or interfering with such timber; 2d. From prosecuting Smith Barton, an employee of the plaintiff, on account of such timber or on account of cutting, drawing, taking or using the same; 3d. From doing any act to prevent or hinder the plaintiff or his agents from removing said timber and using the same. He procured an *ex parte* injunction in accordance with this prayer in the complaint, on furnishing an undertaking, executed by Stephen McCoy, that the plaintiff would pay all damages, not exceeding five hundred dollars, which might be sustained by the defendants by reason of said

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order, if the court should finally decide that the plaintiff was not entitled thereto. The court did so finally decide—the ultimate judgment in the action being in favor of the defendants—dismissing the plaintiff's complaint with costs. Meanwhile, the defendants obeyed the injunction, and the plaintiff, not being interfered with, cut and removed from the defendants' land timber to the value of four hundred and fifty dollars. After the judgment was perfected, a reference was ordered, on the application of the defendants, to ascertain the damages sustained by the defendants by reason of the injunction. The referee reported the same at \$450—that being the value of the logs taken and used by the plaintiff. The plaintiff, on notice, moved at special term to set aside the report: 1st. On the ground that the damages were excessive; 2d. On the ground that the referee had adopted an erroneous principle in assessing the damages; 3d. On the ground that there was no proof to sustain the report. The special term overruled the exceptions to the report and confirmed the referee's report. On appeal, the general term affirmed this decision. From the latter order, the plaintiff appealed to this court. The plaintiff is insolvent. The point now made is, that the damages are merely nominal, and that the damages sustained arose, not by reason of the injunction, but by reason of the tortious act of the plaintiff and his agent, in taking the defendants' timber, for which an action of tort lies against them.

I think the order should be *affirmed*. 1st. The defendants have actually lost, and the plaintiff has actually and improperly obtained the property in question. It turns out to have belonged to the defendants and not to the plaintiff. 2d. By the injunction the defendants were restrained from taking or using their own property, and the plaintiff was impliedly authorized to take the possession of the property, if not to appropriate it to his use. Availing himself of this authority, he has thus taken and

appropriated it, and it is forever lost to the defendants. 3d. No other mode of compensation is open to the defendants, except in the form of damages on account of an injunction inequitably issued. The judgment in the action does not include an award of damages for this property improperly converted by the plaintiff. If it did, I do not see that it would be a bar to this proceeding. No other suit will avail the defendants, for the plaintiff is irresponsible, and the defendants ought not to be subjected to the contingency of possible success in recovering its value from the plaintiff's agent. 4th. The damages in question are occasioned by the injunction. But for the injunction the defendants would not have lost their property. By the injunction the plaintiff was impliedly authorized to take it, subject to the liability for damages in case of failure in the action. The loss which the defendants have sustained, was incurred by compliance with the order of the court. If the defendants had commenced an action, and obtained an injunction restraining the plaintiff from interfering with the property, they would have preserved it, and by reason of success in the suit, relieved themselves from liability under the injunction order. If they had failed in such an action, having in the meanwhile appropriated the property, it is difficult to see why the adverse party could not have assessed his damages under the injunction order and undertaking to the value of the property illegally converted. The liberal rule of damages declared in adjudicated cases in principle sustains the claim of the defendants in this case. (*Coates v. Coates*, 1 Duer, 664; *Edwards v. Bodine*, 11 Paige, 223; *Corcoran v. Judson*, 24 N. Y. 106; *Aldrich v. Reynolds*, 1 Barb. Ch. R. 613.)

It is said the damages were not sustained by reason of the injunction, because the plaintiff and his agents would be liable to an action for an unauthorized conversion of the property. The reasoning is inconsequential. The remedies are in fact cumulative. The injunction was

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decided to be a complete protection to the enjoined party from all loss which could by possibility ensue in consequence thereof, so far as the same was occasioned by the act of the *party applying for the injunction, or his agents*. The reference is a summary mode of relief, given by way of substitute for an action, and intended to accomplish all the results of an action on the undertaking. If the action were upon the undertaking, and the complaint should aver the termination of the suit unfavorably to the plaintiff, the appropriation and conversion of the property by the plaintiff, the acquisition of the possession by the plaintiff of the property through and by means of the injunction, it is difficult to see why the loss of the property to the defendants could not be said to be the direct, proximate and necessary result of the injunction order. It matters not whether the injunction conferred upon the plaintiff the right to *appropriate* the property to his use. Assume that it did not. It nevertheless impliedly authorized him to take possession of it, or countenanced him in doing so, inasmuch as it forbade all others to interfere with him in acquiring such possession. In this respect it is somewhat analogous to the bond in an action of replevin, and impliedly imposed upon the defendant the obligation to return the property in the event of an unfavorable termination of the suit. Having taken possession, it is lost to the defendants through his wrong or his negligence. This is the very result against which the injunction was designed to protect the party. It may possibly be as is said to have been decided in the unreported case of *Lent v. McNaughton* (which we have not seen), that the illegal conversion of the property by a *stranger* to the suit does not constitute a proper item of damages on the injunction bond. Perhaps it would be so unless proof was offered reasonably connecting the loss of the property with the granting of the injunction order, or the party obtaining the injunction with the tortfeasor. But this is a case where the

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party who obtains the injunction and procures the undertaking is himself guilty of the conversion, accomplished only by the facilities which the injunction put in his way, and the operation of which the defendants were forbidden by the injunction to prevent.

I think there is no sound reason for disturbing the report of the referee, and that the order of the court below should be affirmed.

All the judges concurring, order affirmed.

Abstract of case.

**THE NEW YORK DRY DOCK COMPANY v. TIMOTHY STILLMAN
and others.**

In November, 1834, S., having previously acquired the title to certain lands at D. for the benefit of himself and others, conveyed one moiety thereof to N. On the same day an agreement was entered into between S. and N., by which they agreed each with the other to convey one undivided fourth part of said lands to the N. Y. & E. Railroad Company, on condition that said company should, within seven years, construct a single track of their road to D. But that if said company should fail to perform that condition they would divide the said one-fourth part of the land between themselves. On the 8th of January, 1838, the several persons interested in the lands, including the railroad company, agreed on a plan for dividing the same amongst themselves; in pursuance of which all the parties interested conveyed, by deeds absolute on their face, their interests in the land, including the railroad company's shares, to N., who was to convey to such parties the portions of the land to which they were respectively entitled, except that the share of the railroad company was to be conveyed to N. and K. in trust to convey the same to the company on the performance of the condition aforesaid; but if the company should fail to perform that condition, then the trustees were to divide the lands, or their proceeds, amongst the persons interested therein. N. thereupon conveyed the portion of the lands intended for the railroad company to T., who conveyed the same to N. and K. and the latter gave back to the railroad company a declaration of trust, setting forth the terms and conditions on which they held the land, and a like declaration setting forth the terms and conditions on which they were to convey the same, or divide the proceeds amongst the parties interested therein. All these conveyances were executed and delivered on the 1st and 2d of March, 1838. The railroad company failed to perform the condition upon which the land was to be conveyed to it. On the 26th of October, 1838, a judgment was docketed against S. in favor of G., on which the land forming the railroad company's share was sold by the sheriff, and was redeemed by the plaintiffs as assignees of a junior judgment, who received a deed from the sheriff. In 1850 N. and K. sold the shares of the railroad company, and the proceeds of ten parts thereof, belonging to S. under the declaration, amounted to \$11,226.83, which was the fund in controversy. The defendant claimed the same under a subsequent judgment against S. and a creditor's bill founded thereon.

Held, 1. That a valid trust was not created by all or any of the conveyances executed by the parties, in respect to the share of the lands intended for the railroad company, the trust attempted to be created not being for either of the purposes for which alone express trusts are permitted.

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2. That although the trust was void, there was a valid power in trust vested in N. and K. by the conveyance of March 1, 1838.
3. That there being no legal interest in S. on the 26th of October, 1838, on which the judgment of G. could be a lien, the title of the plaintiffs to relief must fail.
4. That the arrangement between the parties interested in the land prior to March 1, 1838, created no trust. That their rights and liabilities rested in covenant, whereby each owner agreed to give a portion of his land to the railroad company, and that the title did not pass charged with any such obligation, except so far as either party had the right in equity to compel a specific performance.
5. That S. did not, as the beneficiary of the power in trust, become, by virtue of section forty-seven of the statute of uses and trusts, vested with a legal estate in the land, upon the failure of the trust estate to vest in N. and K.
6. That it was not until the declaration of trust in behalf of the respective owners took effect that S. was clothed with any interest whatever in the lands, or their proceeds. That the interest he then acquired was an equitable title to enforce the execution of the power and the sale of the lands for an account and distribution of the proceeds.

Appeal from a judgment of the Supreme Court.

THE principal question was whether Walter Smith, on the 26th day of October, 1838, had any legal estate in certain lands at Dunkirk set apart as and for the share of the New York and Erie Railroad Company, which was bound by the lien of a judgment recovered against him on that day by Isaac E. Guernsey, and which lands, being sold on an execution issued thereon, were redeemed by the plaintiffs as assignees of a junior judgment recovered by Obadiah Holmes on the 6th day of May, 1839. The plaintiffs claimed that Smith had the legal estate in that share. The appellant Stillman claimed that he had no such estate, but, if any, at most only an equitable interest not subject to any lien of the judgment, and not capable of a sale on the execution, and that he acquired all the interest of Smith under an assignment made by him for the benefit of creditors, and a purchase from and a conveyance by a receiver in a creditor's suit against Smith upon a judgment recovered on the first Monday of January, 1840, against Smith

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by Chauncey Tucker, and also under an assignment to him by Smith on the 9th August, 1848. The dispute was about the proceeds of the lands; which, subsequent to the attempted redemption, were sold by trustees in whom a power in trust had been created, as held by the court below, by a conveyance to them, amounting to \$11,226.83. Another question was whether the plaintiffs could purchase and hold these lands by way of redemption under the statute, under a judgment purchased by and assigned to them for a purpose not within their charter.

Walter Smith, in the year 1834, had the legal title to a large tract of land at Dunkirk, which he held for and with the consent of several associates, in his own name, having taken the conveyances thereof with their approbation; so that there was no resulting trust in their favor, although they paid portions of the purchase money. About the same time, and by several conveyances, with the like assent of his associates, of whom Russel H. Nevins was one, Smith conveyed one-half of the lands to Nevins by absolute deeds. At the time of each conveyance he and Nevins entered into an agreement with each other providing, among other things, that in case the New York and Erie Railroad Company should within seven years construct and finish their railway by a single track from Owego to Dunkirk, they would convey to the company "as a free gratuity" one-fourth of the lands, or would sell such one-fourth and give the company the proceeds. The title to the lands remained in Smith and Nevins, with the consent of their associates, until January, 1838, when they met, and by resolution agreed upon a committee of two of their number "to prepare a division of lands and property at Dunkirk, so that one-fourth should be held subject to the conditions of the grant originally made to the railroad company, and the remaining three-fourths to be divided in half shares among the proprietors, in order that proper deeds may be duly executed." This division was made by lot; the one-fourth

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for the railroad company, upon which the question in this case arises, being drawn by itself as one of the proprietor's shares and constituting a separate parcel. Other distinct parcels were allotted to each proprietor. It was then agreed that "the whole title and estate in the lands, and in every part thereof, should be vested in Nevins in fee, and that he should thereupon execute and deliver conveyances to the proprietors respectively of the shares drawn by him, upon the payment by them of the proportion of the claims and expenses to which such respective shares were liable." As to the railroad company's one-fourth share, it was agreed that it should be conveyed to and vested in Nevins and Charles C. King as trustees, subject to the performance of the conditions upon which their title was to become absolute, "reserving thereupon the amount of the expenses for money, taxes, and other matters, properly chargeable to the one-fourth of the property." In order to carry into effect the division and distribution thus made, on the 1st day of March, 1838, Smith & Nevins, and all the other proprietors, having or claiming any interest in the lands, including the railroad company, executed deeds of conveyance, absolute on their face, vesting all their interest in the lands, including the railroad company's shares, in Nevins. These conveyances being voluntary, and the grantee of their own selection, there could be no resulting trust in favor of the grantors; and the title became absolute in Nevins, including the railroad company's share, and Smith had no legal estate in any part of the lands. Nevins then conveyed to the proprietors who had paid for their shares the lots drawn by him. Then, in order to carry the agreement into effect, as to the railroad company's share, on the same 1st day of March, 1838, Nevins, with the consent of all the proprietors, by deed, conveyed that share (except one block omitted by mistake) to Elihu Townsend, his heirs and assigns forever, subject to the conditions, and reserving the amount of expenses, &c., and

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then Townsend and wife conveyed it to Nevins and King as joint tenants and not as tenants in common. Then Nevins and King, on the 1st and 2d days of March, 1838, executed two declarations of trust; one to the railroad company, and the other to the other proprietors; the first declaring the interest of the railroad company, as already stated; and the second, that of these proprietors in case the railroad company did not perform the condition by completing the single track from Owego to Dunkirk within the seven years, and providing, in case that event did not occur (as it did not), that they would sell the railroad company's share of the land and pay the net proceeds to the proprietors in certain proportions; that of Smith being ten shares. On the 4th January, 1840, Smith being insolvent, made an assignment of all his property to four trustees, in trust for creditors. On the 20th January, 1843, the land forming the railroad company's share, was sold by the sheriff on the judgment of Guerusey against Smith, and was redeemed by the plaintiffs within fifteen months, as assignees of the judgment of Holmes against Smith, and they received a sheriff's deed. On the first Monday of January, 1840, Tucker recovered, his judgment against Smith, and upon a creditor's bill based upon the return of an execution unsatisfied, on the 10th day of April, 1845, obtained a decree, setting aside Smith's assignment for the benefit of creditors; the assignees and Smith were decreed to convey everything to a receiver who was declared vested with all his interests, and the receiver subsequently, and on the 25th day of November, 1853, sold and conveyed all Smith's interest in the railroad company's share, &c., at auction to the appellant Stillman. Stillman had previously, and on the 9th day of August, 1848, obtained a conveyance of all Smith's interest in that share. It was expressly found that none of the conveyances by Smith to Nevins were fraudulent as to creditors, and no such fact was alleged in the complaint. In June, 1850, Nevins and King sold the shares

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of the railroad company, and the proceeds of ten parts of it belonging to Smith under the declaration of trust, equivalent to \$11,226.83, which is the fund now in controversy. It was claimed that if Smith had a legal estate in the lands forming the railroad company's share, it passed under the sheriff's deed, and the plaintiffs, if authorized to redeem, would be entitled to the fund; if not, that it passed to the appellant Stillman, through the receiver, and he is entitled to it.

The referee who heard the cause, and the general term of the supreme court, in the eighth district, decided that the trust to sell in Nevins and King was invalid as a trust, but good as a power in trust; that the legal estate in the land remained in Smith, and the plaintiffs were entitled to the fund. Stillman excepted and appealed to this court.

Wm. Curtis Noyes, for the appellant.

I. The conveyances by Smith to Nevins, and by Nevins to Townsend, were made with the full assent and approbation of all the associates who had paid in part and were paying the purchase money; each was absolute on its face, unaccompanied by any valid trust or any declaration thereof, or any power in trust, and vested the entire title to the lands in fee simple in each successive grantee, leaving no legal or equitable estate in Smith.

II. It was the intention and agreement of all the parties to vest the whole title and estate in the lands, first in Nevins, and then in Townsend; and that neither of them individually should be charged with, or assume any trust in regard to them. In fact, no trust was declared, nor did any exist as to either of them, and hence the sixth section of the statute of frauds was directly applicable, inasmuch as it declares that "No * * * trust or power over, or concerning lands, or in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, assigning,

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surrendering or declaring the same." (2 R. S. 134, § 6.) The seventh section then declares that the preceding section should not be construed to "prevent any trust from arising or being extinguished, by implication or operation of law, &c.," which was amended in 1860, by inserting the words "Nor to prevent any declaration of trust from being proved by any writing subscribed by the party declaring the same." (Laws 1860, ch. 322.) It was held, under the original sixth section, that it was necessary that the trust should be declared by some deed or conveyance actually subscribed by the party charged with the trust (*Wright v. Douglas*, 3 Selden, 564); and the effect of the amendment would seem to be to dispense with the "deed or conveyance," and to recognize a trust as valid, although declared by a less formal instrument, if actually subscribed. In this case there was neither, and therefore no trust could exist either in Nevins or Townsend.

III. Nor could any trust in either of them arise "by act or operation of law;" inasmuch as all the parties who assented to the conveyances, and had paid as much of the consideration money as had been paid, and were to pay the balance, well knew and approved of the making of the conveyances to them precisely as they were made; and were, of course, chargeable with knowledge of the law, which prevents any such trusts from arising. (1 R. S. 728, § 51; *Norton v. Stone*, 8 Paige, 222; *Brewster v. Power*, 10 id. 562.)

IV. No trust whatever could result from such a transaction, except in favor of the creditors of these persons interested in and who paid for the lands, who assented to the conveyances (1 R. S. 728, § 52); but such a trust could not constitute any legal or equitable estate in their favor or in favor of their creditors, in the land, but simply a pure trust enforceable only in equity. Hence, it has been held that the land is not subject to any lien of a judgment in favor of a creditor against the party interested in the land

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when the conveyance was made, and that it is not subject to sale on an execution against him. (*Garfield v. Hat-maker*, 15 N. Y. 475; 2 R. S. 368, § 26.)

V. The opinion of the court below seems to concede that the whole estate and title in the lands did vest in Townsend, because it assumes that Nevins & King obtained valid power, in trust from them, to sell the lands for the benefit of Smith and his associates; and yet it seems to assume also that the same legal title passed from Smith to Townsend, so that the judgment became a lien upon it. But these two propositions are contradictory; for, if the contemplated trust was invalid as such, and only sustainable as a power in trust, then the legal estate remained in Townsend until divested by the execution of the power, as the legal title could not pass to Smith and his associates as beneficiaries, giving them an absolute title, and the trust remain valid as a power, in order to divest that power by a sale for their own benefit. In other words, if the legal title passed to Smith and his associates as beneficiaries, the power became inoperative; if the power was valid, no legal title vested in Smith and his associates, but remained in Townsend.

VI. And this is the rule as declared by the revised statutes: if the trust be invalid as such, because not allowed by the fifty-fifth section, but is valid as a power in trust, no title vests in the trustee, but it remains in the donor, or creator of the trust or power, until divested by the execution of the power.

1. Section forty-nine of the revised statutes, as to uses and trusts, only prohibits the vesting of any "estate or interest" in the trustee; no estate or interest is given to the beneficiary. (1 R. S. 728, § 49.)

2. Nor under the forty-seventh section would the legal estate vest in the beneficiaries, because they were not entitled to the "actual possession of the lands, or the receipt of the rents and profits."

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3. Besides, the case of a trust invalid as such, but valid as a power in trust, is expressly provided for by sections fifty-eight and fifty-nine, the last of which declares that the lands "shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power."

4. This is, moreover, the view taken of the sections in question by COMSTOCK, J., of this court, who, in construing these provisions of the statute of uses and trusts, says: "The result is that express trusts (using that term in the strict technical sense, as descriptive of legal titles, vested in a trustee for the fiduciary purposes declared in the instrument) were abridged, and confined to the enumerated classes. But the trust limitation, although not belonging to that class, if not otherwise unlawful, will be effectuated in a different mode. If of a passive character, the use is executed by vesting the title in the beneficiary. If active, it takes effect as a power in trust, leaving the title in the donor or his heirs, subject to the power." (*Downing v. Marshall*, 23 N. Y. 380.)

5. Again, the trust, or power in trust in this case, could only have been created by the "owner of the estate, or one having authority to dispose of it, or of some interest therein;" and this was Townsend, to whom the lands were conveyed for this purpose (*Selden v. Vermilyea*, 3 Comst. 525), and it is plain that any estate or interest not embraced in the trust or power, and not otherwise disposed of, remained in or reverted to the person who created such trust or power, who was Townsend and not Smith. (*Sterrick v. Dickinson*, 9 Barb. 519; 1 R. S. 729, § 62. Same rule as to express trusts; 4 Kent's Com. 210; *Briggs v. Davis*, 21 N. Y. 574.)

6. Again, to hold that any legal estate vested in Smith and his associates, would violate the plain intention of the parties and render null much of what they had done; for, having once had the title, they intentionally divested them-

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selves of it and conveyed it to Townsend, else they would have conveyed directly to Nevins and King; and, besides, they intended to leave the legal title in Townsend until it became necessary to execute the power in favor of the railroad company, until it was ascertained whether they would perform the condition upon which their title was to become perfect. The intention of all the parties, so plainly shown, cannot thus be violated. (*Rawson v. Lampman*, 1 Seld. 456; *Ring v. McCoun*, 6 id. 268.)

VII. Where, therefore, Smith and his associates had no legal estate in the lands subject to the lien of a judgment, or liable to be sold on execution, yet they had an interest in the execution of the power upon the failure of the railroad company to perform the condition which they or their assignees could then compel in equity, and so could their creditors. (1 R. S. 734, § 93; 735, § 143.)

VIII. The appellant Stillman became entitled to Smith's share of the lands and their proceeds, under Smith's assignment to his assignees, and the receiver in the judgment creditor's suit, and by his deed or assignment from the receiver; having purchased the interest at the receiver's sale.

IX. The plaintiffs' charter only authorized them "at any place or places in the city and county of New York, and also at any place or places in the county of Kings, to construct and use one or more dry and wet docks, and other artificial means or basins, of such dimensions and materials and in such form and manner as they may deem expedient for the purpose of building, receiving and repairing ships or vessels; and shall be capable in law of holding such estate or property as may be necessary for the accommodation and furtherance of their said business and concern," (Laws 1825, ch. 114, § 1,) and did not warrant their redeeming, or—what is the same thing—purchasing and holding real estate elsewhere; and hence, they had no right to redeem or take the deed for the lands, the proceeds of which are in controversy.

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1. No express power to redeem on judgments in their favor was given, as was done in the charter of the Chautauque County Bank; and the general powers of corporations as conferred by the revised statutes, are not more extensive than the charter itself. (1 R. S. 599, § 1, sub. 4; *Chautauque County Bank v. Risley*, 4 Denio, 480; S. C. 19 N. Y. R. 369.)

2. The decision in favor of the right of the bank in the case cited, to take a sheriff's deed, did not involve any determination as to the right to redeem; for there, the time for a second redemption had expired, and the bank purchased the sheriff's certificate of sale, and took the deed as assignee of the purchaser, having themselves previously assigned two of the judgments in their favor, on which a redemption had been made by the assignee of the certificate, as their agent. In other words, they took the deed in satisfaction of a debt, which the charter expressly authorized.

3. To sustain the purchase in this case, it must be held that the plaintiffs may buy up judgments against any person, which will authorize a general dealing in them, and then may redeem and hold any quantity of real estate it may be able to obtain by such methods.

X. If it be conceded that the conveyances to Nevins and King, with the covenants or declarations of trust executed by them to the grantors, and the Erie Railroad Company created an express trust, and that such trust, was not void under section 55 of the statute of trusts, so that the legal title and estate remained in the grantors still,

1. The trust in Nevins and King was void as a trust, but valid as a power in trust (2 R. S. 729, § 58), not for the benefit of Smith alone, but for the joint as well as several benefit of each and all the grantees; the execution of which power could have been enforced in equity by either or all of them, or by the respective assignees of their beneficial interest. (Id. 734, § 96.)

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2. It was a special power in trust, such as is provided for in subdivision 2 of section 95, embracing a class of persons (as to each share of the railroad company and the other grantees) and not a power in trust for each of them, severally or alone.

3. Smith, prior to the appointment of the receiver, could have compelled the execution of the power—so could his assignee in insolvency, and so could the receiver after his appointment; and this, whether he had become vested with the legal estate of Smith in the land or not. (*Id.* 735, § 104.)

4. The interest of Smith, as beneficiary, under the power in trust, was contingent upon the failure of the railroad company to perform the condition upon which they would become entitled, and was entirely distinct and different from any strict legal estate he had in the land; so that if he had conveyed such legal estate by deed, the grantee would have taken it, subject to the execution of the power. Until such execution, the grantee would have been entitled to possession, and to the rents and profits; but would not, as simply grantee, and in the absence of any covenants to that effect, have been entitled upon a sale under the power, to a share of the proceeds of the land as beneficiary under it, as against an assignee of Smith's beneficial interest.

5. So Smith could at any time have sold his contingent interest as beneficiary under the power, retaining the legal estate in the land, and until the latter should be divested by a sale under the power, enjoying the rents and profits.

6. If the sale on the execution and the sheriff's deed, vested in the plaintiff the legal estate of Smith, which was only an estate subject to be divested by the execution of the power, they were only entitled to receive the rents and profits until the sale in execution of the power, and acquired no other estate or interest.

7. It follows, therefore, that the equitable and beneficial interest of Smith in the power in trust, being a distinct

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and separate interest, did not pass to the plaintiffs by the sheriff's deed.

8. As a necessary result, therefore, Stillman, as the purchaser at the receiver's sale of Smith's beneficial interest in the execution of the power, which was entirely distinct and different from any legal estate he may have had in the land, is entitled to the proceeds arising from the execution of the power.

C. Tucker, for the respondent.

I. The conveyance from Smith to Nevins, March 1, 1838, the subsequent conveyance by Nevins to Elihu Townsend on the same day, and the conveyance by Townsend to Nevins & King, as joint tenants on the same day, and the agreement between King & Nevins, of the one part, and the New York and Erie Railroad Company, of the other part, on the same day, and the subsequent agreement on the next day, between Nevins & King, of the one part, and Smith and all the other parties interested, amounted to an express power in trust, leaving or vesting the legal title in Smith, subject only to the execution of the power. So far as regards this land, the matter is to be treated the same as though the conveyance by Smith to Nevins, for the purposes of partition, the conveyance on the same day by Nevins to Townsend, and from Townsend to Nevins and King, as joint tenants, together with the declaration of the conditional rights of the New York and Erie Railroad Company, and the subsequent declaration of the manner in which Nevins and King should dispose of the property and distribute the proceeds, had all been embodied in one instrument. (Cow. & Hill's Notes, 1421, and cases there cited; *Cornell v. Todd*, 2 Denio, 130; *Smith v. Ransom*, 21 Wend. 202.) These several instruments refer to each other, and when read together, amount briefly to this: The several tenants in common desire to make partition, and to

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accomplish that object, by mutual agreement convey the land to Nevins and King, they covenanting by the same agreement to sell the same and distribute the proceeds among the several tenants in common, in severalty, according to their respective interests. If the several instruments refer to each other, it is not necessary that they be dated the same day. (1 Comst. Rep. 186.) This creates an express power in trust in Nevins and King to sell these lands for the benefit of the respective owners, and distribute the proceeds to each, as therein expressed. By 1 R. S. 728, § 49, it is provided that in every disposition of lands in this manner, no estate or interest shall vest in the trustee; of course the legal title is in the persons for whose use or benefit the conveyance was made. (See § 47 of the same Statute, page 727.) By section fifty-eight of the same statute, page seven hundred and twenty-nine, it is provided "that when an express trust shall be created, for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees, but the trust of directing or authorizing the performance of any act which may lawfully be performed under power, shall be valid as a power in trust." (As to powers in trust, see 1 R. S. 732, § 77; Id. 734, § 94; *Downing v. Marshall*, 23 N. Y. R. 366, 377 to 380.) That section applies clearly to this case. These tenants in common had a right to empower Nevins and King to sell this land and distribute the proceeds, and until that sale took place, Smith, or his representative, was vested with a "legal estate in the land, of the same quality and duration, and subject to the same conditions as his beneficial interest." (§ 47; *Rawson v. Lampman*, 1 Seld. 456.) This latter case also proves the rule that all these instruments must be read together as one instrument. This being the case, the judgment of October 26, 1838, through which the respondents obtained title, became a valid lien upon all of Smith's interest in the land. The subsequent judgment of May 6, 1839, under which the respondent

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redeemed, as judgment creditor, was also a valid lien. Smith's general assignment was not made till January 4th, 1840. The title of the respondent became perfect by sheriff's deed long before the sale by Nevins & King, under the power in trust. The respondents being the owners of the entire interest of Smith, at the time Nevins and King sold the property, (June, 1850,) under the power of sale, became entitled to the ten thirty-eighths of the proceeds, to recover which this action is brought, and the judgment of the court below to that effect, upon the report of the referee, was right. The power in trust being valid, the respondent's title was subject to the execution of the power, by Nevins and King, and hence the respondent became entitled to the ten thirty-eighths of the proceeds of the sale, after the execution of the power. (1 R. S. 729, § 59. See also page 735, § 108.)

II. This is not a trust arising by implication of law under sections 50, 51, 52 and 53 of page 728 of the statute of uses and trusts. The fact that the trust and its object is clearly expressed by taking all the instruments by which it is created, as one entire instrument, negatives the idea of an implied or resulting trust. If it were true, as claimed by the appellant, that an implied trust was created, it could only be a trust in favor of the respondent as creditor, under section 52 on page 728. The debt on which the judgment of October 26, 1838, was recovered, existed as early as the 20th of April, 1835. (See also 2 R. S. 125, § 1, 6 Hill, 438, 440.)

MULLIN, J. In the autumn of 1834, Walter Smith acquired title to certain lands at Dunkirk, in Chautauqua county, for the benefit of himself and others, and in November of that year he conveyed one moiety thereof to Russel H. Nevins. On the same day said last mentioned deed was executed and delivered, an agreement was entered into between Smith and Nevins, wherein and whereby they

agreed, each with the other, to convey one undivided fourth part of said lands to the New York and Erie Railroad Company, upon condition that said company should, within seven years from the 8th day of September, 1834, construct a single track of their road to Dunkirk. But if said company should fail to perform said condition, they would divide said lands amongst themselves. Subsequently, and prior to the 8th day of January, 1838, said Smith conveyed other lands to said Nevins, under like agreements as to the share of said railroad company. Nevins held said lands for the benefit of divers persons who had furnished the moneys to him to pay for the same.

On the 8th day of January, 1838, the several persons interested in said lands held a meeting in the city of New York, and agreed on a plan for dividing said lands amongst all those entitled to portions thereof. In pursuance of the arrangement then made, all the parties interested conveyed their interests in said land to Nevins, and Nevins was to convey to said persons the portions of the said lands to which they were entitled, except that the share of the railroad company was to be conveyed to said Nevins and Charles C. King, in trust to convey the lands set apart to said company on performance by it of the condition aforesaid as to the construction of its road to Dunkirk. In the mean time said trustees were authorized to sell and convey said lands and to deliver to said company the proceeds, after deducting the charges and expenses incident to said sale. But if said company should fail to perform said condition, then said trustees were to divide said lands, or their proceeds, amongst the several persons interested therein, in certain proportions.

To carry into effect this arrangement and division, Nevins conveyed the portion of the lands intended for the railroad company to Elihu Townsend, and Townsend conveyed to Nevins and King, the persons selected as trustees, and the trustees gave back to the railroad company a declaration

of trust, setting forth the terms and conditions on which they held said land, and a like declaration setting forth the terms and conditions on which they were to convey said lands, or divide the proceeds, amongst the parties interested therein. All the conveyances aforesaid were executed and delivered on the 1st of March, 1838, except the declaration of trust in favor of Smith and the others, which is dated the 2d of March, 1838.

It is not found, nor does it appear, that in the deed from Smith to Nevins, or in that from Nevins to Townsend, there is any reference to the arrangement or trust in favor of the railroad company, or of the proprietors, in the event of the company failing to perform the condition.

The Guernsey judgment, under which the interest of Smith was sold, was docketed on the 26th of October, 1838; and the Holmes judgment, under which the plaintiffs redeemed, was docketed on the 6th of May, 1839. Unless the Guernsey judgment became a lien on the interest of Smith in the portion of the lands set apart to the railroad company, the sheriff's sale and the redemption under the Holmes judgment were void, and the plaintiffs are not entitled to recover, whether Stillman is or is not entitled to hold Smith's shares of the railroad lands.

It is not claimed by either side that a valid trust was created by all or any of the conveyances executed by the parties, in relation to the share of the lands intended for the railroad. The trust was undoubtedly void, and the only questions presented for decision in the case are whether the fee in said land remained in Smith, passed to the railroad company or to the trustees, or whether by reason of there being a valid power in trust in Nevins and King, the real interest in the lands was not an equitable interest merely, which passed through the receiver in the Tucker suit to Stillman, leaving the fee nominally only in Smith, which if sold, covered nothing but a mere nominal interest to the purchaser at the sheriff's sale.

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Although the trust was void, there was a valid power in trust vested in Nevins & King by the conveyances of the 1st of March, 1838. (3 R. S. 5th ed. 21, § 77.) That section is in these words: "When an express trust shall be created for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees, but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions in relation to such powers contained in the third article of this title."

By the seventy-eighth section it is declared that in every case where the trust shall be valid as a power, the lands to which the trust relates, shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.

Considering the conveyances from Smith to his immediate grantees, and from them to their grantees, and so on from one party to another until the title is finally vested in Nevins & King, as separate and distinct transactions, the only parties to the trust would be Townsend and the trustees. In that case, the trust being void, the title under section seventy-seven above cited would be in Townsend. The several parties through whom the title passed, would in that view of the case have conveyed away their respective estates in the land, and there would have been no legal interest in Smith on the 26th of October, 1838, on which the judgment of Guernsey could be a lien, and the title of the plaintiffs to relief must fail.

The arrangement between the parties interested in the land prior to the 1st of March, 1838, created no trust. Their rights and liabilities rested in covenant, whereby each owner agreed to give a portion of his land to the railroad company. The title did not pass charged with any such obligation, except so far as either party had the right in equity to compel a specific performance.

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But it is said that the several conveyances of the 1st of March, 1838, are to be treated as parts of one transaction, and hence that Smith who held the title in fee on that day to a part of the premises in question, is to be deemed and taken to be the person who conveyed in trust to Nevins & King, and it was in him and not in the intermediate parties in whom the title remained; the trust being valid as a power in trust only.

Whatever consequence may follow from treating the several instruments executed on the 1st of March, 1838, as one instrument, the fact still remains that Smith on that day conveyed the fee to Nevins in that part of the lands that was intended for the railroad company, and Nevins by a similar conveyance conveyed the fee to Townsend. Neither took in trust, as in the conveyance to neither was a trust expressed, and no declaration of trust was ever executed by either.

The plaintiff does not ask that a part of the proceeds of the railroad land be awarded to him, because in equity his judgments are liens on the lands or their proceeds; but its claim to relief rests on the legal lien of the Guernsey judgment, and a sale in pursuance thereof. Unless, therefore, there was a legal lien, the plaintiff has no claim to relief at law, as title was out of Smith by a deed in fee, and the fee passed from him to Nevins; and as between them, Smith had no remedy at law or in equity. And it was not until the declaration of trust in behalf of the respective owners took effect that Smith was clothed with any interest whatever in the lands or their proceeds. The interest he then acquired, was an equitable title to enforce the execution of the power and the sale of the lands for an account and distribution of the proceeds.

The judgment of the court below should be reversed, and a new trial ordered, costs to abide the event.

SELDEN, J. The right of the plaintiff to maintain this judgment, depends primarily upon the question whether

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the judgment recovered by Guernsey against Smith, in October, 1838, was a lien upon the lands from which the fund in controversy was derived.

It is clear that the conveyance of the premises in question on the 1st of March, 1838, by Townsend and wife to Nevins & King, taken in connection with the agreements executed by the latter to Smith, Townsend and others, and to the New York and Erie Railroad Company, although invalid as a trust, it not having been made for either of the purposes for which alone express trusts are permitted (see Statute of Uses and Trusts, §§ 45, 55), was nevertheless valid as a power in trust, under section 58 of the same statute. This is conceded by the counsel on both sides. Under this conveyance, therefore, Smith in common with his associates, had a contingent equitable right to his ratable proportion of the proceeds of the lands. It is not claimed that this equity could be seized and sold upon execution. The mode of reaching such an interest is prescribed by the statute. (1 R. S. p. 734, § 93; p. 735, § 103.)

But the counsel for the respondent contends that, aside from this mere equity, Smith had, subsequently to the creation of the power, a legal title to, or interest in the lands, upon which the judgment in favor of Guernsey might attach as a lien; and in support of this position he cites and relies upon sections 47 and 49 of the statute of uses and trusts. (1 R. S. pp. 727, 728.) He also cites section 58 of the same statute, and insists, no doubt justly, that this case falls directly within the latter section. His argument is, that as, under this section, no estate could vest in Nevins and King, the trust to them being valid simply as a power, Smith, as the beneficiary of the power, became, by virtue of section 47 of the statute, vested with a "legal estate in the land." But this is an entire misapprehension of the statute. A very clear exposition of these provisions of the statute concerning trusts, is given by COMSTOCK, J.,

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in the case of *Downing v. Marshall* (23 N. Y. R. 366, 379). Section forty-seven refers exclusively to a class of passive trusts where the *immediate* possession and whole beneficial use of the land is given directly to the *cestui que trust*, the trustee being made by the deed the depository of a mere naked title, with no active duties to perform in respect to the property. In such cases this section, in connection with section forty-nine, vests the whole estate in the beneficiary. The deed takes effect upon the title, but not according to its terms.

Section fifty-eight, on the other hand, applies to cases where active duties are imposed upon the trustee, and where no rights are given to the beneficiary except through the execution of the trust. In cases of this class, if the trust is not one which is authorized by section fifty-five, no estate whatever passes under the deed, either to the trustee or the *cestui que trust*, but the title remains in the grantor, the grantee becoming, if the duties imposed upon him are such as can be legally and properly executed, the mere trustee of a power. A case might perhaps be supposed, which would belong partly to one and partly to the other of these classes; as where, by the same instrument, the immediate possession and use is given to the beneficiary, while certain powers in relation to the property are at the same time conferred upon the trustee; but this is not such a case. Here no possession or privity of the profits is given to the beneficiaries, or either of them, and consequently they can take no title whatever under section forty-seven. The case falls entirely within section fifty-eight of the statute, and by virtue of the next section, viz: section fifty-nine, the estate in all such cases remains in "the persons otherwise entitled, subject to the execution of the trust as a power."

This language excludes the idea that any title *passes* to any one by virtue of the deed. The title does not pass; it "*remains*." The persons "otherwise entitled," must be

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those in whom the title would rest independently of the deed, being of course the grantors themselves. It is clear, therefore, that Smith had no title to the lands in question, under section forty-seven, as the beneficiary of the trust attempted to be created.

There is, however, another view of the case which, although not very distinctly presented, is perhaps hinted at in the brief of the respondent's counsel. It claims that the several deeds from Smith to Nevins, from Nevins to Townsend, from Townsend to Nevins and King, and the counter agreements executed by the latter, being all parts of one and the same transaction, are to be read and construed together as one instrument. Assuming this to be so (as perhaps it is, so far as the papers executed on or about the 1st of March, 1838, are concerned), it might be urged with much apparent force that as the conveyances from Smith to Nevins, and Nevins to Townsend, were merely preliminary to that from Townsend to Nevins and King, and designed solely as a means of conveying from Smith to Nevins and King the powers which were ultimately vested in them, no other or greater effect ought to be given to the two previous deeds than to the final deed from Townsend to Nevins and King. That deed conveyed no title, but simply a power. Why, then, it might be asked, should the prior deeds which, so far as the trust to Nevins and King was concerned, were merely intended to give effect to that deed, be held to have done more?

It would indeed seem that if the whole object of this series of deeds was to create the power vested in Nevins and King, then no title could have passed to any one under them, or either of them; in other words, that the effect would have been the same as if the conveyance had been directly from Smith to Nevins and King, in which case the title to such undivided portion of the lands as was conveyed by Smith on the 1st of March, 1838, would, under section fifty-nine of the statute, have remained in Smith;

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and in that case, if it could be fairly maintained that as to the ten thirty-eighth parts belonging to Smith, the fund in controversy should be held to have been derived from that portion of the lands, the plaintiffs would be entitled to the money they have received. There is, however, an insurmountable objection to this conclusion. The reasoning by which it is reached assumes that the *sole* object of the deed from Smith to Nevins on the 1st of March, 1838, was to create the power in Nevins and King, in which the series of conveyances resulted. But such was not the fact. That conveyance was given in part execution of the plan adopted to carry into effect the division and distribution of the lands among all the joint proprietors which had been agreed upon. It was thought proper for that purpose to vest the whole title and interest, both legal and equitable, in Nevins, and the deed from Smith was essential to that object. Unless that deed is held to have taken effect according to its terms, the whole scheme of distribution was a nullity. There was nothing whatever to prevent its taking effect as designed, and hence Smith, by its execution, was completely divested of all legal title to the lands, and as it has been shown that he could derive no such title under the trust, it follows that the judgment of the supreme court was erroneous, and should be reversed:

HOGEBOM, J., was absent. All the other judges concurring, judgment affirmed.

Statement of case.

JOHN H. BULLARD v. B. F. RAYNOR and another.

After an account containing, among other items, a charge of the sum paid to take up a note made by the debtor, has been rendered to the debtor, and its correctness conceded by him, and the account has become a stated account, neither the debtor nor his assignee can assail the note for usury, when the same is brought forward as a set-off by the party rendering the account.

If one permits an account into which a usurious item enters, to become stated, and then assigns to a third person his demands against the party rendering the account, the assignee will take the claim subject to the right of the party rendering the account to rest upon the same as a stated account.

Usury is a defence personal to the party known as the borrower. He can not transfer to another the right he has to allege and prove a demand to be usurious.

The maker of a promissory note, tainted with usury, may by bill in equity, assert the usury and defeat the note as a set-off, notwithstanding an account between him and the holders thereof, embracing such note, has been rendered, and has become a stated account. But while it stands a stated account as between him and the holders of the note, the assignee of the maker is concluded by it, and can not assail the note for usury when it is claimed as a set-off.

THE plaintiff by his complaint, claimed to recover of the defendants as partners, the sum of \$114.38 for goods sold and delivered to them. Also, \$3,173.04 for money loaned to and debts assumed by E. F. Bullard for the defendants, for \$1,000 of which the defendants gave their note at six months from 30th September, 1854, payable to the estate of Jacob Snyder, which note was afterwards transferred to said E. F. Bullard. It was alleged there was still due on said note \$104.18. E. F. Bullard assigned all his claims against defendants to the plaintiff.

The defendant Raynor alone appeared, and by his answer alleged that the \$114.38. for goods sold, had been fully paid.

The note for \$1,000 was borrowed of the defendants, and was wholly without consideration. That the money loaned

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by E. F. Bullard had been fully paid, and that there was a balance due the defendants which they insisted upon by way of counter-claim.

On the trial the plaintiff proved a letter signed by defendants, and addressed to E. F. Bullard, in which they admitted an indebtedness to the plaintiff for potatoes and buckwheat in the sum of \$114.38, and requested said E. F. B. to settle with the plaintiff for the same. This letter was dated 23d December, 1854. The plaintiff rested. On the part of the defense, it was shown by E. F. B. that he did assume the said debt of \$114.38 to his brother the plaintiff, and by the defendant Raynor, that said E. F. B. was credited in account on the defendants' books for this sum, and that the account containing such credit had been rendered to E. F. B., and its correctness conceded. It was also shown that the plaintiff when inquired of by the defendants whether E. F. B. had assumed said debt, admitted he had, and subsequently said E. F. B. had applied to the plaintiff for leave to sue the defendants in his name for the said \$114.38. The only item of dealing between the parties really in controversy in this suit, was one of \$75, the facts in regard to which were briefly as follows: There is charged to E. F. B. on the defendants' books under date of 20th July, 1854, the sum of \$75, as "*paid your note held by Harrington after shaving it. It will be due the 13th inst.*" The account containing this item, with others of dates prior and subsequent, consisting of both debts and credits, was rendered to E. F. B. as above stated, and its correctness conceded by him. E. F. B. testified that the note thus charged to him, was a note which he loaned to Harrington for his (H.'s) accommodation, and that he (H.) was to pay and take it up. Raynor testified that Harrington brought said note to the defendants' store, and wanted the money on it, and he (R.) proposed to let him have \$70 for the note, and Harrington accepted the offer, and R. paid him the \$70 and took the note.

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The court charged the jury among other things, that if the \$75 note was usurious, yet if the maker had stated the account including it, and thereby admitted the correctness of the charge, the plaintiff claiming as assignee of the maker, could not set up the defense of usury; to which the plaintiff's counsel excepted.

The appellant's counsel in his points, insisted on the alleged error in this branch of the charge only to reverse the judgment of the court below.

The jury rendered a verdict for defendants. On which judgment was entered, which was affirmed at a general term in the 4th district.

A. Pond, for the appellant.

J. R. McIntosh, for the respondents.

MULLIN, J. E. F. Bullard assigned to the plaintiff all claims and demands which he had against the defendants. This assignment unquestionably carried all moneys due said E. F. Bullard from the defendants, whether for loans or advances made to the defendants, or for debts paid by him for them. The plaintiff took subject to all defenses existing against his assignor in favor of the defendants. The amount which the plaintiff was entitled to recover, was the balance due to E. F. B. after allowing all payments made by the defendants. Amongst other deductions which the defendants claimed should be made from the amount of moneys apparently due to E. F. B., was the note of \$75 loaned by him to Harrington. This note, if valid, was a legal set-off against E. F. B. and against the plaintiff, unless the latter can assail it for usury.

Two reasons are assigned why the plaintiff can not assail a claim against his assignor for usury. 1st. Because he is not a borrower; and 2d. Because the assignor had stated the account between himself and the defendants, in which

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he was charged with the money paid for the note in question, thereby admitting the correctness of the charge. The plaintiff can not thereafter set up usury to defeat the claim.

I can not agree to the first proposition. I think the assignee of the demand in suit can resist it for usury, unless his assignor has by his acts in reference thereto, precluded him. No rule of law is better settled than that the purchaser of property charged with a usurious lien or claim, can allege the usury and defeat the claim, when the purchaser sold discharged of such usurious lien. (*Post v. Dart*, 8 Paige, 639; *Shufelt v. Shufelt*, 9 id. 137; *Ord on Usury*, 131; *Brooks v. Avery*, 4 Coms. 225.)

In *Shufelt v. Shufelt*, the chancellor gives the reason of the rule. He says (page 145): "In the ordinary case of the giving of an usurious mortgage by the owner of the mortgaged premises, the statute having declared the usurious security void, the owner of the premises, of course has the right to sell his property or to mortgage the same, as though such void mortgage had never existed. And the purchaser in such a case necessarily acquires all the rights of his vendor to question the validity of the usurious security. For if the original mortgagor had not that right, the premises would to a certain extent, be rendered inalienable in his hands, notwithstanding the security was absolutely void as to him."

The principle must embrace personal property as well as real, and the right of the vendee to avail himself of the usury in the dealings between his vendor and a third person touching the property, must reach every case where such third person attempts to appropriate the property purchased, by virtue of any usurious contract with the vendor.

The case before us affords a very apt illustration of the necessity of extending the principle to this class of cases. Assuming that the defendants were indebted to E. F. B. \$100 or any other sum, and that the defendants held the note in controversy void for usury, if the \$100 were not

the subject of sale and assignment, discharged from any usurious lien or agreement in reference thereto, the debt would be practically inalienable. The law gives to a debtor the right to retain in his hands money due from him to another, sufficient to satisfy any demand he may have against his creditor, which is available as a set-off. This is to all intents and purposes a lien on the fund, and if the set-off is usurious, the person entitled to the fund must be entitled to avail himself of the usury.

In such a case it is competent for the vendor or assignor to waive the usury and sell the claim, subject to any lien which may exist against it, or he may elect to consider the usurious lien void, and sell the claim discharged of it, and in such case the vendee or assignee will have the right to protect the whole interest he has purchased against the usurious lien.

Although the learned judge, who delivered the opinion of the court below, declares it to be his opinion that the plaintiff could not resist the note in question on the ground of usury, the decision of the court is not put on that ground, but upon the second ground above stated, viz: that if E. F. B. had stated the account including the usurious note, and thereby admitted the correctness of the charge, the plaintiff could not resist it on the ground of usury. •

We must assume that the jury found the note to be usurious; that the account was stated including the note, and that the plaintiff thereby admitted its correctness.

The charge leaves it uncertain whether the plaintiff was prevented from asserting the usury by reason of an estoppel resulting from the acts of his assignor, or whether the note must be held to have been paid before the assignment to the plaintiff. As the same judge delivered the opinion in the general term who tried the cause at the circuit, we must assume that his charge at the circuit was put on the latter ground, as that is the one put forth in the opinion at the general term. So understanding the charge, I think

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it was right. The defendants kept the account on their books of the moneys received from and paid to E. F. Bullard. It was their right to charge him with the note given by him to Harrington, subject to its being repudiated when the entry came to his knowledge. A copy of the account embracing this item was presented to him, and this charge was never disputed by him. After the expiration of a reasonable time from the rendition of this account without objection, it became stated. The effect of stating an account is to bind the party by it as correct in its items and in the balance struck, and thereafter the burthen is on him to show it to be increased by reason of fraud or mistake. (*Lockwood v. Thorne*, 1 Kern. 170.)

If E. F. Bullard was concluded by the rendition of the account, the result would be that he having assented to the appropriation of the moneys in the defendants' hands to the payment of the note, he is not permitted to recall it; and the demand passed to the plaintiff with this item adjusted and satisfied between the assignor and the defendants.

In *Barrow v. Rhineland* (1 Johns. Ch. R. 550; Same case in error, 17 Johns. R. 538), Chancellor KENT held that stating an account did not preclude a party who had been the victim of a usurer from obtaining relief in chancery against the usury. The same doctrine has been asserted in other cases. (2 Johns. Ch. R. 191; 1 Ves. Sr. 317; *Bullock v. Boyd*, Hoff. 294; *Philips v. Belden*, 2 Edw. 1.) I do not intend to disturb these cases. If the usury laws are to be enforced so as to prevent usury, they must not leave a door open through which the usurer can insert his finger; if an opening is left he will soon have his whole body through. If stating an account will prevent investigation into a usurious transaction, all dealings into which usury enters will soon take the form of stated accounts, and the law be made a shield, instead of a sword, against violators of this wholesome and necessary law.

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If E. F. B. were the party plaintiff, I should hold him entitled to repudiate this settled account, and to resist the set-off of the note. But, so far from manifesting any desire to take advantage of the usury, he has permitted the account into which this usurious item enters to become stated, and then assigns to the plaintiff. The latter must take the claim, subject to the rights of the defendants, to rest upon the account as stated.

Usury is a defense personal to the party known as the borrower. He cannot transfer to another the right he has to allege and prove a demand to be usurious.

The only way a third person can avail himself of usury is by purchasing property charged with a lien or incumbrance which is usurious, and then only in protection of his title. On the facts in this case E. F. B. might, by bill in equity, have asserted the usury in this note, and defeated it as a set-off, notwithstanding the account between him and the defendants had become a stated account; but while it stood as a stated account as between him and the defendants, the assignee was concluded by it, and could not assail it successfully so as to let in the defense of usury.

The appellant has not alluded, in his points, to the charge of the court in regard to the mistake of \$100 in the defendants' account, which they were permitted on the trial to rectify as against the plaintiff; and hence I presume he has become satisfied that the ruling was right. If the point was raised, it would be unavailing, as there can be no doubt but that such mistake could be corrected between the original parties, and the plaintiff could recover no more than his assignor was legally entitled to recover from the defendants.

The judgment should be affirmed, with costs.

WRIGHT, J. The questions arise upon the charge of the court; and, to have a right understanding of them, it will be necessary to see what the case was. The plaintiff

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claimed, as assignee of E. F. Bullard, to recover of the defendants, as partners, the sum of \$104.18, as the balance of accounts between E. F. Bullard and the defendants. The substance of the arrangement between the defendants and Bullard, out of which the account arose, was, that he should, from time to time, let the defendants have money, and they were to receive and pay his drafts and orders when presented. In the fall of 1856, E. F. Bullard stated the account between the parties, making the sum of \$109.11 as the balance due to him. The account, as thus made up, was presented to the defendants, and payment of the balance demanded; but not being paid, it was assigned by E. F. Bullard in March, 1857, to the plaintiff. The complaint admitted that the defendants had from time to time made payments to E. F. Bullard, leaving the sum of \$104.18 due him on the 1st December, 1856, for which amount judgment was demanded. In the account as stated by the plaintiff's assignor, among other items therein allowed to the defendants as payments, was a \$75 note made by Bullard, payable to the order of one Harrington, which was paid by the defendants. It appears in evidence that about a week after the date of the note, which had ninety days to run, Harrington came to the defendants' store, and wanted to get the money on it. The defendants' objected to paying it then, saying that money was worth more than the interest to them; but Harrington finally agreed to take \$70 for it, and they paid him that amount. Through mistake in the account stated by E. F. Bullard, no credit was given to the defendants for \$100 paid to S. G. Perkins, on the 26th September, 1854, on Bullard's order. Allowing the Harrington note as a payment, and also the \$100 paid to Perkins and omitted to be credited, it would leave nothing due to the plaintiff. The court charged the jury, among other things, that if the \$75 note was usurious, yet if the maker had stated the account including it, and thereby admitted the correctness of the charge, the plaintiff, claim-

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ing as assignee of the maker, cannot set up the defense of usury. To this proposition there was an exception. The court further charged, that if the jury were satisfied from the evidence that the \$100 claimed to have been paid by the defendants to Perkins, September 26, 1854, was actually paid under authority from E. F. Bullard, and was omitted in the account through mistake, they would have the right to allow it to the defendants as a credit in the account between the defendants and E. F. Bullard; to which the plaintiff excepted, and requested the court to charge that, under the facts of this case, the defendants were estopped from setting up said \$100 mistake against the plaintiff in this action, which was refused.

None of the exceptions are now insisted on, except the first; and that, I think, is not tenable. If the note for \$75, made by E. F. Bullard and payable to Harrington at the defendants' store, was tainted with usury, the plaintiff is not in a condition to set up the usury in avoidance of so much of the account stated by his assignor. Whether there was usury in the transaction depended upon Bullard's testimony, who stated that the money was loaned by him to Harrington, for the accommodation of the latter. If so, the discounting of it by the defendants, for \$70, was usurious. On the contrary, if it was not an accommodation note, but belonged to the payee, and was given for a debt of the maker, there was no usury in its inception, and the defendants were at liberty to purchase it from Harrington for \$70, or any other sum that they agreed upon. Conceding, however, that it was a usurious loan, and might have been avoided by E. F. Bullard, the borrower, the plaintiff, under the circumstances of this case, cannot interpose the statute against usury, in his behalf. Bullard, in December, 1856, stated an account with the defendants, in which was included the \$75 note in question, and admitted it as an offset against a corresponding amount in his favor, and cancelled the one in payment of the other. The bal-

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ance claimed as due to him was \$109.11, over and above all the items he had allowed as payments; and this account as stated by him, Bullard himself testified, was the one he assigned to the plaintiff. The plaintiff brought his action to recover this balance, claimed to be due from the defendants to his assignor upon such accounting. On the trial, he attempts to impeach, on the ground of usury, one of the items on the credit side of the account which his assignor had allowed as a payment, and struck the balance accordingly. This he could not do. If there was any usury in the case, his assignor had waived it, and when an assignor waives the defense of usury the assignee cannot set it up. Here the assignor did not merely waive the defense of usury, and sell the account subject to the items allowed and admitted by him to be proper offsetting items; but the purchaser took it subject to such items, and thereby bound himself to allow and pay them. Again: in the complaint the plaintiff admitted the payments allowed by his assignor, and sought only to recover the excess or balance claimed by such assignor as being due at the time of the assignment. The important issue raised by the pleadings was the amount paid to E. F. Bullard, and, according to the plaintiff's own showing, one of the payments made to and allowed by Bullard was the \$75 note, sought to be avoided on the ground of usury. He cannot be permitted to deny the payments averred in his complaint (which includes all allowed by his assignor), nor question the validity of them.

There is another conclusive ground against the plaintiff. No one but a party to a usurious loan, or his heirs, devisees or personal representatives, can avoid a usurious contract on account of usury. (*Post v. The Bank of Utica*, 7 Hill, 391; *Rexford v. Widger*, 2 Comst. 131.) Usury cannot be set up by a stranger to the original transaction. A purchaser from the borrower is not included in the term borrower, and cannot avoid a note or mortgage for usury.

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(*Schermerhorn v. Talman*, 4 Kernan, 127.) Nor is a right of action to avoid notes or contracts, on account of usury, assignable.

The judgment should be affirmed.

All the judges concurring, judgment affirmed.

CHARLES E. HALEY v. JUSTUS E. EARLE.

The general rule in actions for damages arising from negligence, is that the defendant's negligence makes him liable, unless the plaintiff has done something to contribute to the accident. If he has, then he can not recover.

Although the plaintiff has been guilty of negligence, yet, if his negligence had nothing to do with the occurrence, the defendant has no right to seek on that account to excuse the negligence on his part which caused the injury to the plaintiff.

Hence, in an action for damages caused by a collision of boats, it is not erroneous for the judge to charge that, although the plaintiff's boat was without a helmsman, that was a matter of no consequence, unless the absence of a helmsman contributed to the injury.

THE plaintiff was the owner of a barge, which was towed by the steamer Niagara, on the Hudson river. The defendant was running a steamboat called the New Jersey, which boat came in collision with the barge, in consequence of which the barge was injured and sunk. At the time of the collision there was no helmsman on the barge. There was evidence upon the question whether the accident was owing to the want of a helmsman. The court charged the jury that if both were careless, there must be a verdict for the defendant. "That the plaintiff's barge was without a helmsman. *This was a matter of no consequence, unless the absence of a helmsman contributed to the injury.* If it did, the plaintiff could not recover." The jury found for the plaintiff. The general term affirmed the judgment.

— — —, for the appellant.

Ira Harris, for the respondent.

INGRAHAM, J. The only question in this case is whether the judge erred in submitting to the jury the question

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whether the want of a helmsman on board of the barge contributed to the accident, and if not, that that fact did not prevent the plaintiff's recovery.

The general rule in these actions is that the defendant's negligence makes him liable unless the plaintiff has done something to contribute to the accident. If so, then he can not recover. To this extent the judge at the circuit charged the jury. Was he in error in adding the instruction that if it did not contribute to the injury it was a matter of no consequence?

There is a class of cases in which the omission to do some necessary act, or the doing of some act which is forbidden, prevents a recovery, although it does not produce the act complained of. Such is the case of an insurance, where the breach of any representations made to the insured, or the omission to do some act required by the policy, affects the right of recovery, although the damage did not arise from such cause. But I do not understand that rule as applying to cases of torts. If the plaintiff, by his acts, contributes to the injury, he can not recover, irrespective of the defendant's negligence. But if he does nothing, or omits to do any thing to cause the accident, he is not in fault and may recover, although guilty of negligence which might, under other circumstances, have led to the injury.

In *Dygert v. Bradley* (8 Wend. 469), a new trial was granted because the judge charged the jury that the plaintiff was bound to select as a station on the canal at which to stop his boat, a safe place which would admit of the passage of boats.

In *Carroll v. The New York and New Haven Railroad Company* (1 Duer, 571), this question was examined at length, and the rule laid down "that one party can not recover from another damages for an injury, when his own negligence or wrong contributed to bring about the occurrence, and that if his own negligence or wrong did not

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contribute to produce the act which caused the injury, the party doing the act is liable."

There can be no reason for setting aside this judgment for such a cause. If the negligence of the plaintiff had nothing to do with the collision, the defendant has no right to seek on that account to excuse his negligence which caused the injury to the plaintiff.

The judgment should be affirmed.

All the judges concurring, judgment affirmed.

Abstract of case.

**LAWRENCE BRAINERD and NELSON C. WOOD, assignees, &c.
v. GEORGE E. DUNNING and J. S. SMITH.**

A provision, in an assignment of property in trust for the benefit of creditors, directing the payment of debts and liabilities due, or *to grow due*, if intended to secure debts or claims not then in existence, but which are afterwards to be created, either by the assignor or the assignees, would be void.

But a clause directing the payment of debts, bonds, notes, bills and sums of money due and to grow due, is not subject to such a construction. It applies only to claims then in existence. Whether due or to grow due, is immaterial.

A clause providing for the payment of all debts, &c. due to the assignees from the assignor, "or for which he is liable, or may become liable to them, including notes, bills and drafts indorsed and guarantied by them," &c., refers to such notes, &c., on which the assignees are indorsers or guarantors, and on which the liability has not yet been fixed by protest—claims which they may pay, or become liable to pay, by reason of indorsements or other responsibilities which they have already made or incurred for the assignor.

A direction for the payment of all debts, demands and sums of money for or upon which, or on account of which the assignees, or either of them, have become or *may be rendered liable*, for or on account of the assignor, applies only to *past* debts, and not to new ones to be created, and vests no discretion in the assignees. It only secures debts which have been assumed, or on which the assignees may be rendered liable.

If the findings of a referee are imperfect, it is the duty of the party who is not satisfied with them to apply for more specific findings, instead of seeking to avail himself of such defects. In such cases the finding of facts necessary to sustain the judgment will be presumed.

D. and S., the plaintiffs in an attachment suit, issued an execution therein, without any directions to the sheriff not to levy on any particular property; and were afterwards informed that the sheriff had levied on certain lumber claimed by B. and W. as assignees of the judgment debtor, and that a suit was threatened by B. and W. The attorney of D. and S. refused to give the sheriff directions not to sell the lumber. D. and S. knew the lumber was advertised for sale under the execution, and they afterwards received the proceeds of the sale, in payment of their execution.

Held, that these facts would have been on a trial before a jury, sufficient to submit to them the question whether D. and S. had not by their acts, ratified the taking of the goods by the sheriff, and the subsequent sale of them to pay their claim.

Held, also that D. and S. having, with full knowledge of all the facts, and

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without objection, received the proceeds of the lumber and applied them to their own use, this amounted to a ratification of the levy made by the sheriff, and made them liable to the real owner, for the property so sold.

THIS action was brought by the plaintiffs, assignees of Lawrence R. Brainerd, an insolvent debtor, to recover from the defendants the value of certain property assigned to them, and which was taken and sold by the sheriff under an attachment and execution issued upon a judgment recovered in their favor against Leonard R. Brainerd. The complaint charged the defendants with taking, carrying away and converting to their use the property. The defendants answered by a general denial, and a justification of taking the property of Lawrence R. Brainerd, under the attachment and sale under the execution, and they averred that they gave no directions to the sheriff in attaching or selling the property. It appeared on the trial, and the referee so found, that an attachment in favor of the Bank of Malone was issued on the 3d October, 1857, under which the property in question was attached by the sheriff on the 5th October, 1857, the property then being at Champlain Rapids. That on the 6th October, 1857, Brainerd made an assignment of all his property to the plaintiffs, for the benefit of his creditors. The assigned property was partly real and partly personal, and located in various places in this State and elsewhere. The assignees, on receiving the assignment, proceeded at once to take possession of the assigned property, and make the inventories. This occupied several days. Prior to the assignment being executed, an agreement was made with the bank, that they would abandon their attachment if an assignment was made preferring the debt due to the bank. The sheriff was informed of this by the attorney for the bank on the 12th October, and was informed of the same agreement by the assignees on the 6th October.

On the 6th of October an attachment was issued in the action in favor of the defendants, which was delivered to

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the sheriff that evening, at a place some distance from where the goods were. The sheriff immediately annexed to the attachment a list of the goods attached previously at Champlain Rapids, under the attachment in favor of the bank, on the 7th of October. The sheriff went to Champlain Rapids and looked over the property. He afterwards informed the defendants he had taken the lumber on their attachment. A judgment was afterwards obtained in that action, and an execution issued on the 10th of November, 1857, under which the sheriff sold the attached property. The property was bought by the plaintiffs, who paid for it \$109, and the sheriff paid the proceeds to the attorney. No directions were given by the defendants either to seize the goods under the attachment or to sell them under the execution, but both defendants and their attorney knew they had been seized under the attachment, and that the sheriff had advertised the lumber for sale under the execution. The plaintiffs gave notice of their claim as assignee, and the sheriff applied to the defendants for indemnity, which they refused, and told him to call a jury. He went on without such jury, sold the property, and paid over the proceeds to the defendants' attorney, who paid the same to the defendants. The referee found for the plaintiffs, and his judgment was affirmed, on appeal.

A. J. Parker, for the appellants

Palmer & Armstrong, for the respondents.

INGRAHAM, J. Two questions have been submitted to us on this appeal.

1. Whether the assignment under which the plaintiffs claim, is not void for giving a preference for debts for which the assignor might thereafter become liable to the plaintiffs, or either of them.

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2. Whether the defendants in any way directed an interference with, or did any acts making themselves liable for the acts of the sheriff in selling the property seized under the attachment.

(1.) The words of the assignment complained of are, "shall pay and discharge in full all debts, bonds, notes, bills and sums of money, due or to grow due to the parties of the second part, or either of them, from the assignor, or for which he is liable or may become liable, including notes, bills and drafts indorsed and guaranteed by them, &c., and all debts, demands and sums of money for or upon which or on account of which they, or either of them, have become or may be rendered liable for or on account of the party of the first part." The objection made to this provision is that it includes drafts and liabilities not then in existence. If this provision was intended to secure debts or claims not then in existence, but which were afterwards to be created either by the assignor or the assignee, it would be void. This was settled in *Sheldon v. Dodge* (4 Denio, 217), where an assignment contained a provision giving a preference to debts which should thereafter become pressing, and for which Dodge should, as surety, become responsible; and the objection to it was that the instrument reserved to the assignee the power of declaring which of the debts in a certain class should become preferred, by agreeing subsequently to become liable therefor. This principle was previously settled in *Grover v. Wakeman* (11 Wend. 187), viz: that the assignment must declare who are to be preferred, and a reservation of that power either to the assignor or assignee rendered it void. (See also *Barnum v. Hempstead*, 7 Paige, 568.) But, as is said in the latter case by the Chancellor, I do not think that this clause of the assignment is subject to such a construction. It provides for the payment of debts, bonds, notes, bills and sums of money due and to grow due. This evidently applies only to claims then in existence; whether

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due or to grow due was immaterial. It further provides "or for which the assignor was liable, or may become liable to them, including notes, bills and drafts endorsed by them." This evidently referred to such notes, &c., on which the assignees were endorsers or guarantors, and in which the liability had not yet become fixed by protest; claims which they might pay, or become liable to pay, by reason of endorsements or other responsibilities which they had already made or incurred for the assignor. (*Van Dine v. Willett*, 24 How. Pr. R. 206.) The remaining part of the clause is still less objectionable, as it provides for the payment of all debts, demands and sums of money for or on account of which they have become or may be rendered liable. This clearly applies only to past debts, and not to new ones to be created, and vests no discretion in the assignee. It only secures debts which have been assumed or on which they may be rendered liable. The instrument throughout bears a construction perfectly consistent with an honest intention; and as fraud is not to be presumed where the instrument is consistent with an honest intention, I see no reason for imputing a fraudulent intent to the parties in making this assignment.

I am unable to find in the case any evidence that this question was raised on the trial, or submitted to the referee, and there is no finding by the referee either of fact or law to which the defendants have excepted which properly raises this question. Even if there were doubts as to the assignment, I think the objection should have been taken below, to make it available in this court.

(2.) The other ground of appeal is that there are no facts in evidence to make the defendants liable for the levy made by the sheriff, if such levy was upon property belonging to the plaintiffs.

The referee held the defendants liable for acts occurring before the sale, as well as the receipt of the money after the sale, with full knowledge of the source from which the

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money was obtained. We are asked by the appellants to confine ourselves to the finding of the referee in this case, and not to look into the testimony to see whether there is enough to sustain it.

The report of the referee is very imperfectly made up if it is intended as a substitute for findings of fact or law. But where the findings are thus imperfect, it is the duty of the party who is not satisfied with them to apply for more specific findings, and not seek to avail himself of such defects; and this court has held that in such cases the finding of facts necessary to sustain the judgment will be presumed.

But I think there is evidence enough in the case to warrant the submission of this question as one of fact. The defendants knew that the sheriff had levied on property claimed by the plaintiffs as assignees. They knew that a suit was threatened by the assignees. They issued the execution without any directions as to this lumber which the sheriff was by law required to sell and apply to the execution, unless otherwise directed. Their attorney refused to give the sheriff directions not to sell it. The defendants knew the lumber was advertised for sale under the execution, and afterwards they received the proceeds of the sale in payment of their execution. All these facts as found by the referee would have been, on a trial before a jury, sufficient to submit to them the question whether the defendants had not, by these acts, ratified the taking of the goods by the sheriff, and the subsequent sale of them to pay their claim. (*Judson v. Cook*, 11 Barb. 642; *Fox v. Jackson*, 8 Barb. 357.)

The case of *Wilson v. Tuman, et al.* (6 Manning & Gr. 236), relied on by the appellants, was one where the plaintiff did no act and was sought to be charged by proof that he had said he had a claim on the property, but nothing was done to the property by him or, so far as the case shows, by the sheriff, after that declaration. Without

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expressing an opinion as to the agreement of this case with some of the decisions in this state on that question, it is enough to say that the present case differs very materially from the former, in that the plaintiffs in the execution, with full knowledge of all the facts, and without objection, received the proceeds of the property and applied them to their own use. Such receipt of the proceeds of the sale to their use on the execution, with the knowledge they possessed, is a ratification of the levy made by the sheriff, and makes them liable for the property so sold, to the real owner.

In *Freeman v. Ritchie* (13 Ad. & Ell., N. S. 780), the mere receipt of the money, without knowledge of the illegal taking, was held to be insufficient to make out a ratification of the seizure; but in that case the court recognize the distinction between the receipt of the money with the knowledge that a trespass had been committed, and taking it without such knowledge. In the former case it might amount to a ratification.

The judgment should be affirmed.

SELDEN, J., also read an opinion in favor of affirmance; and all the other judges concurring, judgment affirmed.

Abstract of case.

ROSS W. WOOD and A. H. GRANT v. ISAAC B. WELLINGTON
and E. B. ABBOTT.

The charter of the Atlas Mutual Insurance Company, granted in 1848, adopted a section of the charter of the Atlantic Insurance Company, granted in 1842. *Held*, that these acts, being passed subsequent to the revised statutes, must, so far as they prescribe a rule for the transfer of paper held by the company, different from that declared by the revised statutes, be deemed to overrule the former law.

The charter of the Atlas Mutual Insurance Company, in regard to notes received for premiums in advance, authorized the company to negotiate them for the purpose of paying claims, or otherwise, in the course of its business. *Held*, that a note given for premiums on an open policy of insurance to the makers, and afterwards substituted for notes which had been negotiated by the company to the plaintiffs, for the purpose of paying claims, or otherwise, in the course of its business, must be regarded as a note of the character specified in the charter; and that the transfer thereof to the plaintiffs by the company, was lawful, and the title of the plaintiffs indisputable.

Held, also, that if the notes originally negotiated were lawfully transferred to the plaintiffs, the surrender of those notes, and the substitution of others in their place, for the convenience and accommodation of the parties, was not unlawful; it being but an exchange of securities, all of which were of a character which made it proper, under the charter, for the company to negotiate them for the purposes of its ordinary business.

The note sued on was indorsed as follows: "Pay — for account of the Atlas Mutual Insurance Company. G. H. T., Secretary." It appearing that the object of the indorsement was to pass an absolute title to the plaintiffs, and that this was the *usual* mode of transfer with this company; and the nature of the transaction showing that the intention of the parties was to pass an absolute and unrestricted title to the paper; *Held*, that the indorsement, though slightly ambiguous on its face, was susceptible of that construction, and fairly indicated either that the secretary indorsed the note for or on account of the company, or that the plaintiffs, on receiving the sum'due thereon, were to credit the same to the account of the company, as between the transferee and such company.

Held, further, that on such an indorsement the makers could not refuse payment to the holders, whether the name of the payee in the indorsement remained *in blank*, or was filled in with the names of the plaintiffs. That it was a transfer of the title to them, only to be defeated on a production of the note, by proof that the plaintiffs were not the real parties in interest.

Statement of case.

Appeal by the plaintiffs from a Judgment of the General Term of Superior Court of New York, affirming a judgment of non-suit of the Special or Trial Term of the same court.

THIS action was brought against the defendants as makers of a promissory note for \$1,400, dated November 8, 1855, and payable eight months after date, to the order of the Atlas Mutual Insurance Company, of which the plaintiffs claimed to be endorsers and holders. The note was as follows:

"\$1,400.

NEW YORK, *November 8th*, 1855.

"Eight months after date we promise to pay to the order of the Atlas Mutual Insurance Company, for value received, fourteen hundred dollars, payable at the National Bank.

"WELLINGTON & ABBOTT."

The endorsement thereon was as follows, being made by the secretary of the Atlas Mutual Insurance Company:

"Pay — for account of the Atlas Mutual Insurance Company.

"GEO. H. TRACY, Secretary."

The grounds of the motion for a non-suit (which motion was granted), were that the endorsement restricts the plaintiffs' title, and creates them trustees of the note; and also, that there is no resolution of the board of trustees authorizing the transfer or substitution.

The resolution here referred to does not appear in the case, but is supposed to be that referred to in the eighth section of the first article of that title of the revised statutes which speaks "of monied corporations." (1 Revised Statutes, 591.) That section is as follows:

"Section 8. No conveyance, assignment or transfer *not authorized by a previous resolution of its board of directors* shall be made by any such corporation of any of its real estate, or *any of its effects*, exceeding the value of one thousand dollars; but this section shall not apply to the issuing of promissory notes, or other evidences of debt by the officers of the company in the transaction of its ordi-

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nary business, nor to payments in specie or other current money, or in bank bills, made by such officers; nor shall it be construed to render void any conveyance, assignment or transfer in the hands of a purchaser for a valuable consideration and without notice."

The plaintiffs introduced considerable additional evidence beyond proof of the note and the endorsement, which it is supposed was intended to sustain one or more of the following propositions, to wit:

1. That the validity of the transfer of the note did not depend upon the section of the revised statutes just quoted, but upon section eight of the charter of the Atlas Insurance Company. (Session Laws 1843, Ch. 92, § 8.)

2. That the transfer of the note by the Atlas Insurance Company to the plaintiffs was justified by and in accordance with the section of the charter just referred to.

3. That the special endorsement of the note above mentioned, was designed to transfer the whole interest in the note to the plaintiffs, and was effective for that purpose, and was not designed as a restrictive endorsement for the benefit of the defendants.

In support of these propositions, the plaintiffs introduced evidence, the substance of which is hereafter given. The note in question was given to the plaintiffs for premiums upon an open policy of marine insurance. It was transferred to the plaintiffs in substitution for other notes delivered to them as collateral security. On the 30th day of July, 1855, the Atlas Insurance Company borrowed from the plaintiffs their notes for \$10,000, payable in four months, which the company used. The plaintiffs claim that this sum was borrowed to enable the company to pay marine losses, but this is rather an inference from the testimony than the result of any direct proof in the case. To secure this indebtedness to the plaintiffs, the company gave them their notes for a like amount (\$10,000), maturing about the same time, and secured the same by the transfer

Statement of case.

of premium notes held by them, amounting to the sum of \$12,594.19. The notes thus loaned by the plaintiffs to the company were paid by the plaintiffs.

On the 27th day of December, 1855, the plaintiffs wanting notes which they could use, returned to the company some of the notes originally received by them as collateral security, and others to the amount of \$4,354.50 were substituted in their place. Among those thus substituted was the note in suit. There was no resolution of the board of trustees on the minutes in regard to this transaction. The secretary thought there was a resolution of the finance committee, and that they arranged the original transaction or sanctioned it before it was done, and that most of the trustees were aware of it, and approved it. None of them ever disapproved of it. The substitution was made by the direction of the president and vice president of the company.

There was some evidence in regard to the pecuniary condition of the company at the time of these transactions, but the inference from the evidence on the whole is, that they were embarrassed rather than insolvent, and that they did not fail until an injunction was served on them, in March, 1856.

The following papers were read in evidence, as bearing upon the authority for and the mode of transfer of the note in suit:

The charter of the company (Sess. Laws 1843, ch. 92, § 8) makes section 12 of the charter of the Atlantic Insurance Company a part of its charter, and that section is as follows (Laws 1842, ch. 217, § 12):

“The company, for the better security of its dealers, may receive notes for premiums in advance, of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims or otherwise, in the course of its business; and on such portions of said notes as may exceed the amounts of premiums paid by the

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respective signers thereof, at the successive periods when the company shall make up its annual statement, as herein-after provided for, and on new notes taken in advance thereafter, a compensation to the signers thereof, at a rate to be determined by the trustees, but not exceeding five per cent. per annum, may be allowed and paid from time to time."

Under this provision there was a by-law of the company, as follows:

"The president or vice-president, with the advice and consent of the finance committee, or a majority of them, shall have authority to assign, transfer, or otherwise validly dispose of any bond and mortgages, stocks, bills receivable or any assets of the same, in order to convert the same into money, or to secure the repayment of money borrowed by the company through them, the payment of losses, or other purposes that shall have been sanctioned by the finance committee."

On the 30th. October, 1855, the board of directors also adopted a resolution, which was in force when the plaintiffs surrendered their notes and received the note in suit, as follows:

"*Resolved*, That any arrangement made by the finance committee, in paying or arranging for funds to pay the pressing liabilities of the company, and to sustain the institution until other means can be provided, if they shall make themselves or their friends personally liable, the same shall be considered and treated as confidential, in any event equal in all respects to the amount of \$40,000 already subscribed by the friends of the company for its relief."

The secretary testified that the note in suit was transferred and endorsed in the usual way, and that the company had transferred and endorsed the notes held by them in this way, to a large amount.

W. Curtis Noyes, for the appellants.

Gilbert Dean, for the respondents.

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HOGEBOOM, J. It is fair to presume that the court granted the motion for a non-suit on the grounds presented there and here by the counsel for the defendants, and stated in the case; and I shall therefore limit myself to the discussion of the two propositions embraced in that motion.

If this case is governed by the eighth section of the first article of the title of the revised statutes which relates to "moneyed corporations" (1 Rev. Stat. 591), it is not necessary to decide whether the plaintiffs were properly non-suited. There was no previous resolution of the board of directors, authorizing the transfer of the note in question; nor were the plaintiffs purchasers of the paper for a valuable consideration without notice, within the exception to the general effect of that section. As the plaintiffs dealt directly with the Atlas Insurance Company, and not with a supposed *bona fide* holder of their paper, they are chargeable with knowledge of the statutory prohibition in question avoiding a transfer not sanctioned by a previous resolution of the board, and are not within the protection of that class of dealers who purchase *bona fide* from those presumed to have a good title to the paper which they sell.

But I think this case must rest on the charter of the company, granted in 1843, which adopts a section of the charter of the Atlantic Insurance Company, granted in 1842. (Laws of 1843, Ch. 92, § 8; Laws of 1842, Ch. 217, § 12.) These acts were passed subsequent to the revised statutes, and so far as they prescribe a rule for the transfer of paper held by the company, different from that declared by the revised statutes, they must be deemed to overrule the former law. This was distinctly held in a case in this respect precisely similar—that of *Howland v. Myer* (3 Comst. 290.)

Nor is this in conflict with the decision of this court in *Houghton v. McAuliffe and others*, in December, 1863. There was nothing in the latter case to show that there was any provision in the charter of that insurance company

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which conflicted with the rule laid down in the revised statutes; and the latter were therefore properly held to be applicable.

We must, therefore, examine the case with reference to the charter of the Atlas Insurance Company. That charter, in regard to notes received for premiums in advance, authorized the company to negotiate them for the purpose of paying claims, or otherwise, in the course of its business. The note in question must be regarded as a note of that character. It expressly appears that the note was given for premiums on an open policy of marine insurance, and it could not well be, therefore, a note of any other description than those mentioned in the charter. I think we must also assume that the notes for which it, with others, was substituted, in December, 1855, were negotiated for the purpose of paying claims, or otherwise, in the course of its business. The purpose of the *negotiation* of the notes is not very distinctly stated, but taking the presumptions of law and the fair inferences from the facts proved, we are authorized to conclude that they were negotiated in the course of its business—its lawful business. If the notes originally negotiated were thus lawfully transferred to the plaintiffs, I do not see that the surrender of those and the substitution in their place of others (including the note in suit) for the convenience and accommodation of the parties, can be unlawful. It was but an exchange of security, all of which, as well those originally taken as those subsequently substituted, were, so far as we can discover, of a character which made it proper, under the section in question, for the company to negotiate them for the purposes of its ordinary business. In regard to all those matters, as to the notes being taken for premiums in advance or to their being negotiated for a purpose authorized by the charter, inasmuch as no objection was made to them on the trial in these respects, we are authorized to assume that they came directly within the scope of the

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section under consideration. So regarded, their transfer was lawful, and the title of the plaintiffs thereto indisputable, within the case of *Howland v. Myer* (3 Comst. 290), and if the court below non-suited the plaintiffs on this ground, I think it must have been from inadvertence, in not considering the case last referred to in connection with the provisions of the present charter.

The mode of endorsement is supposed also to present an insuperable difficulty in the way of the transfer of the legal title to the paper to the plaintiffs. It is sufficiently clear that the object of the endorsement was to pass an absolute title to the plaintiffs. The secretary states that this was the *usual* mode of transfer, and that notes to a *large amount* have been thus transferred by the company: The nature of the transaction detailed in the evidence, also shows that the intention of the parties was to pass an absolute and unrestricted title to the paper. The endorsement itself, though slightly ambiguous on its face, is susceptible of that construction, and fairly indicates either that the secretary endorsed the note for or on account of the company, or what is more probable, that the plaintiffs on receiving the sum due thereon, were to credit the same to the account of the company, as between the transferee and such company.

In this case no question is made as to the intention of the transfer between the company and the plaintiff. And on the facts shown, I think the company could not be heard to dispute the plaintiffs' title. Clearly the defendants on such an endorsement, could not refuse payment to the plaintiffs, whether the name of the payee in the endorsement remained *in blank*, or was filled in with the names of the *plaintiffs*. It was, I think, a transfer of the title to them only to be defeated, on a prosecution of the note, by proof that the plaintiffs were not the real *parties in interest*.

The judgment should be *reversed*, and a new trial granted, with costs to abide the event.

All the judges concurring, judgment reversed.

THE MANUFACTURERS' AND TRADERS' BANK v. MORRIS
HAZARD, impleaded, &c.

Where M. H., the endorser of a note, wrote his name in the usual manner, and in good faith, in making the indorsement, using the initial only for his christian name, but it was written in such a manner that a person not acquainted with the endorser's christian name would read it A. C. instead of M., and the notary who protested the note read it A. C. and addressed the notice of protest to A. C. H.; *Held*, that the mistake in addressing the notice was directly attributable to the manner and form of the endorser's hand writing in making the endorsement; that the notice sent was a good notice, in law, to the endorser, and that he could not make the mistake which he had thus occasioned available, to shield himself from liability.

And the notice having actually come to the endorser, though after a delay of several days; *Held*, that it was a good notice to charge him, notwithstanding the delay and the erroneous address.

Reasonable diligence is all that is required, in any case; and where a plaintiff acts upon what the defendant appears to have written plainly upon the instrument, that is reasonable diligence, and he is not bound, as between them, to go beyond that, and make inquiries.

It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled, another acting upon it in good faith, and exercising reasonable care and diligence under all the circumstances, that is enough.

Appeal from an order of the General Term of the Superior Court of the city of Buffalo, reversing a judgment of the Special Term and granting a new trial.

THE action was brought against the defendants as makers and endorsers of a promissory note, dated the 13th of July, 1857, made by the firm of Williams, Tanner & Co., payable to the order of the defendant Williams, and endorsed by him and also by the defendant Hazard, for \$2,000, payable at the Metropolitan Bank in the city of New York, sixty days from the date thereof. The defendant Hazard endorsed the note by writing "M. Hazard," instead of his full name. The note was protested for non-payment. The notice of protest was addressed to "A. C. Hazard, Buffalo," which was the place of the defendant's residence, and was duly mailed. On the 21st of Septem-

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ber, 1857, the notice was taken from the post-office in Buffalo by one G. S. Hazard, who retained it until the 23d of the same month, when he delivered it to the defendant. G. S. Hazard had no connection whatever with the defendant. The cause was tried before the court without a jury, who found as facts from the evidence that the defendant's initial in the endorsement was so written that a person not acquainted with his christian name, and who did not know that the defendant endorsed the note, would read it A. C. and not M.; and that the notary who protested the note read it A. C.; and decided as matter of law that the note was properly protested, and gave judgment against the defendant as endorser. The defendant appealed to the general term of said court, where the judgment of the special term was reversed and a new trial ordered. The plaintiff thereupon appealed to this court from the order of reversal, and stipulated that if said order should be affirmed, judgment absolute should be rendered in the defendant's favor.

H. W. Rogers, for the appellant.

G. B. Hibbard, for the respondent.

JOHNSON, J. It is to be presumed that the defendant, when he endorsed the note in question, knew when it was payable, and that if it was not paid at maturity, demand of payment and notice of protest might then be made by some official person, who was neither acquainted with him personally, nor with his signature or his manner of making it. The finding by the court assumes that the defendant wrote his own name in the usual manner, and in good faith, in making the endorsement, using the initial only for his christian name; but determines that this initial was written in such a manner that a person not acquainted with the defendant's christian name, would read it A. C. instead of M.; and that the notary who protested the note read it A.

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C. The mistake, therefore, of addressing the notice of protest to the defendant as A. C. Hazard, instead of M. Hazard, is directly attributable to the manner and form of the defendant's handwriting in making the endorsement. This raises the question whether the notice thus addressed and sent is not a good notice in law to the defendant; and whether he can make the mistake which he has thus occasioned available, to shield himself from liability. I have been unable to find any adjudged case which meets this precise question. In principle, however, the case falls directly within the rule laid down by several of the elementary writers on the subject of notes and bills of exchange; that when through an error caused by the indistinctness of the writing, the notice does not reach the party in season he is not discharged. Thus, Byles on Bills, at page 207, says: "If the notice miscarry from the indistinctness of the drawer's hand-writing on the bill, he will not be discharged." Chitty says: "The misdirection by mistake, of a letter giving notice of the dishonor, will be no excuse for the consequent delay, unless it were attributable to the default of the drawer or indorser himself." (Chit. on Bills, 8 Am. 8 Lond. ed. 489.) Parsons in his recent work on notes and bills, remarking upon the curious questions which have arisen as to the address, says: "If, for instance, the sender has no better means of knowing how to address the drawer than by his name as written by himself in the bill, and through an error caused by the indistinctness of the writing the notice does not reach the drawer in season, the drawer is not discharged." And it is added: "nor should we say, although on this point we have no authority, that the indorsees would be discharged, for the case seems to come under the rule of impossibility, as the holder has done all he could do." (1 Parsons on Notes and Bills, 485, 6.) Byles and Parsons each cite as authority the case of *Hewit v. Thompson* (1 Mood and Rob. 541.) That was a *note prius* case, and the notice was sent to the wrong person, and did not reach the

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drawer until too late. The mistake arose from the indistinctness of the drawer's writing on the bill. The question was submitted to the jury to consider whether the plaintiff had been led into the error through the indistinctness of the description which the defendant had given of himself in the bill; and if he had, they were instructed the defendant was not discharged. The case is not decisive or controlling as an authority; but the principle seems to be founded in the plainest considerations of justice and good conscience, that a party should be bound by a notice addressed, in accordance with the description he has given of himself by his own hand on the bill or note. The defendant actually received the notice as it was addressed, though not till several days after it was sent, and when it would have been clearly too late under ordinary circumstances. But the error which led to the delay, and the misdescription, were both occasioned by the manner in which the defendant described himself in making his endorsement.

It is claimed in behalf of the defendant, that the plaintiff, as holder, has been guilty of laches, and that as to the plaintiff, there was no necessity whatever of sending such a notice. It is insisted that the plaintiff is presumed to have known the defendant's christian name, and should have sent it correctly to its correspondent in New York. But under the circumstances of this case, it seems to me that no want of diligence can justly be imputed to the plaintiff. The note was sent to the place where by its terms it was payable. When default was made by non-payment, notice had to be given forthwith. There was then no time for inquiry, nor did there appear on the face of the endorsement to be any occasion to make any. There did not appear to be any indistinctness or uncertainty in respect to the signature. It appeared plainly to the notary to be the initials of two christian names, instead of one, and the notice was addressed accordingly. I do not think, in a case like this, there is any presumption of law, that the

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plaintiff knew the christian name of the defendant, or was bound to suppose that it was other than what the initials A. C. as they appeared to others might indicate. To my mind it presents the simple case of a mistake in an address of a notice, caused solely by the manner in which the defendant signed the initial letter to his christian name, and for which no one but himself is responsible. And as the notice actually came to him, I think it was a good notice to charge him, notwithstanding the delay and the erroneous address thus occasioned.

Reasonable diligence is all that is required in any case; and where a plaintiff acts upon what the defendant appears to have written plainly upon the instrument, that is reasonable diligence, and he is not bound, as between them, to go beyond that and make inquiries. In principle it is somewhat analogous to the case of a drawer or endorser holding himself out as living at a particular place. In such a case if a notice is sent there in consequence, he is estopped from denying the validity of the notice, on the ground that it has been sent to the wrong place. (1 Parsons on Notes and Bills, 495.)

In *Lawrence v. Miller* (16 N. Y. R. 235), the mistake of serving the notice upon another person of the same name, was not caused by any act or omission on the part of the endorser. That case is plainly distinguishable from this, in that material circumstance.

It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled another acting upon it in good faith, and exercising reasonable care and diligence under all the circumstances, that is enough.

I am of the opinion, therefore, that the order of the general term should be reversed, and the judgment of the special term affirmed.

All the judges concurring, judgment affirmed.

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ELIZABETH MACY, adm'x, &c., of FREDERICK H. MACY v.
DAVID E. WHEELER.

The supreme court has the undoubted power and right to examine the evidence at large, and upon the whole case, including the law and the facts, to set aside a verdict and grant a new trial.

That court can, from the evidence, reach different conclusions of fact from those found by the jury. In reviewing trials, it has power to pass upon questions of fact as well as law; whilst the court of appeals is confined to the correction of errors of law only.

Having no power to review any questions of fact determined in the subordinate courts, when a new trial is granted the court of appeals is obliged to affirm the order, if it can stand consistently with any view to be taken of the evidence given at the trial, where the trial has been by jury.

The legal and record title does not of itself decide the question of liability for supplies furnished to a registered vessel. The question is, to whom was the credit given; and the law adjudges it to have been given to the person in actual possession of the vessel, who controls her operations, receives her freight and earnings, and directs her destination.

The defendant was the registered owner of a vessel, but he held the title merely as trustee for P., the real owner; and had no interest in her earnings, which belonged to P. or the persons to whom he transferred them. The plaintiff furnished a set of sails for the vessel, upon the order of P.: *Held*, that a verdict for the plaintiff could only be warranted by a finding, 1st. That the contract was not made with, and the credit given to, P. exclusively; 2d. That the defendant was in actual possession of the vessel, controlling her movements and interested in her voyage, and directing what should be done with her, in all respects as her owner, when the sails were furnished; or that he expressly authorized P. to contract for the same on his responsibility.

Appeal from an order of the Supreme Court granting a new trial, with a stipulation for final judgment.

THE action was to recover for a bill of sails furnished by the plaintiff's intestate for the bark Peytona, of the value of \$552.23. The sails were ordered by Antonio Pelletier, in December, 1852, or January, 1853, and the defendant claimed, in his answer, they were furnished on the credit of Pelletier, the defendant not owning the vessel when they were ordered and furnished.

The liability of the defendant was rested by the court,

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at the trial, on two grounds: 1st. The jury were instructed that if the defendant was the actual owner and in the possession of and exercising the control of the vessel when the sails were furnished, he would be liable for their value; and 2d. He would be also liable if he expressly authorized Pelletier to contract for the sails on his responsibility. The evidence bearing on these points was substantially as follows:

The vessel was bought by Pelletier in November, 1852. On the 31st of December, 1852, he executed a bill of sale of eight-ninths of her to the defendant. This was recorded on the 4th of January, 1853. A bill of sale of the other ninth was executed to the defendant by Pelletier's order, by Babbridge & Valentine, to whom it had been previously conveyed by Pelletier, dated January 8, 1853, and recorded on the 29th of January, 1853. On the 28th of January, 1853, the defendant signed an agreement with Babbridge & Valentine to purchase of them all stores necessary to fit out the vessel for the voyage. On the 4th of February, 1853, the defendant took the usual oath of ownership of the vessel, at the custom house. On the 8th of February he signed an agreement employing the master of the bark. On the 28th of February, 1853, the defendant put in a claim, in admiralty, as the sole, true and *bona fide* owner of the Peytona. The evidence was all documentary, and these were all the facts tending to show that the defendant was in the possession of the vessel. None of the papers mention or refer in terms to his possession, and they were all subsequent to the contract for the sails, if the defendant's proof was to be credited. On the other hand it was proved by three witnesses that the defendant's actual relation to the bark was as follows: Pelletier owned the Peytona, and wished to make her one of a line of Australian packets. Babbridge & Valentine, ship chandlers in New York, made him advances to enable him to carry out this design, and took an absolute bill of sale of the whole ship for their own security. Pelletier quarrelled

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with them, and made an arrangement with Overman & Grunn, by which the latter firm were to lend him money to pay Babbridge & Valentine, to advance what further sums should be necessary, and to hold the title to the ship as collateral security. As they were aliens, the defendant, who was a lawyer, and engaged in no commercial pursuits, allowed the title to be taken in his name, merely as trustee for them. Babbridge & Valentine would not consent to relinquish their right to supply stores for the voyage, and retained one-ninth of the vessel as security that Pelletier would buy of them; and when it was desired by Overman that the defendant should hold title to the whole, Babbridge & Valentine took an agreement of even date with the bill of sale to him, that the stores should be bought of them. Pelletier had the entire management and control of the bark, employed her captain, and gave him minute instructions in writing for the voyage, purchased her stores, and was advertised everywhere as her proprietor. The defendant never gave an order in relation to her, never received or claimed any part of her earnings, never issued any tickets, never saw the plaintiff's intestate, or knew of his furnishing sails until six months after they were delivered.

The fact was not disputed that Pelletier contracted for the sails. There was evidence on the part of the defendant tending to show that he ordered them about the 20th of December, 1852, and while Babbridge & Valentine were the registered owners of the vessel. On the contrary, the testimony of the plaintiff, Macy, tended to show that they were put on the vessel about the 30th of January, 1853, and had been ordered by Pelletier after the defendant acquired the registered title.

Affidavits of the plaintiff, Macy, were put in evidence, sworn to respectively June 30th and July 29th, 1853, in which he stated that the sails were supplied on Pelletier's credit, and to be paid for by his note at six months. Similar admissions were made to the defendant about the 30th of July, 1853.

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There was no proof tending to show an actual authority to Pelletier from the defendant, to contract on his behalf for the sails, unless it be Pelletier's statement, as follows: "It was understood between Wheeler and me that I was to go on with the vessel and get her ready for sea." Directly afterwards he testified: "Wheeler had no interest in the vessel. * * * I made a contract with Macy for the sails. * * * I was to have the profits of the voyage when the bills were settled. * * * I was owner at the time. I had the entire interest in the profits, and the entire interest in the vessel. * * * There was no arrangement between me and Wheeler. As far as I knew Wheeler merely held the Peytona in trust for Overman & Grunn. I had *exclusive* possession of the Peytona up to two days before she sailed." On the point of authority, the defendant testified explicitly: "I had no interest in the vessel. * * * I had not the possession. * * * I never authorized Pelletier to order a single thing."

When the plaintiff rested his case, the defendant moved to dismiss the complaint on the grounds: 1st. Because Wheeler, being the mere registered owner, is not liable for supplies furnished to his vessel simply on the ground of his registered ownership. 2d. There is nothing tending to prove that the sails were furnished on Wheeler's credit. 3d. Because Wheeler was not registered owner when the sails were furnished. 4th. Because there is no proof that the defendant was in possession of the vessel.

The judge said that, as the case stood, he must grant the motion, because there was no evidence to show Pelletier's authority to order the sails in question. The plaintiff then obtained leave to introduce further testimony, and called Pelletier. After the examination of Pelletier the motion was renewed on the same grounds, and denied, to which the defendant excepted.

The judge, in his charge, submitted two questions to the jury: 1st. Whether the defendant was the actual owner

and possessor of the vessel, and controlled her movements, directing what should be done with her in all respects as her owner, at the time the sails were furnished, and instructed them that if they should so find, then the sails came to his possession, and he would be liable for their value. To this there was no exception. 2d. Whether the defendant expressly authorized Pelletier to contract with the plaintiff for the sails on his responsibility; and if so, then the plaintiff was entitled to their verdict. This was not excepted to.

The jury found a verdict for the plaintiff. The supreme court, at special term, denied the motion for a new trial, and on appeal to the general term that order was reversed and a new trial ordered, with costs to abide the event.

From the last named order the plaintiff's administratrix appealed to this court, stipulating that if the order be affirmed, judgment absolute should be rendered against the appellant.

C. N. Black, for the plaintiff.

E. P. Wheeler, for the defendant.

WRIGHT, J. The only exception on the part of the defendant was to the refusal to non-suit at the close of the plaintiff's evidence. It was not, perhaps, error to decline to hold, on the proof then given, as matter of law, that the defendant had not such a beneficial ownership and possession of the vessel at the time the sails were contracted for and furnished as to render him responsible; or that the contract was made with, and the credit given to, Pelletier, and not to the defendant; or that Pelletier had no actual authority from the defendant to contract on his behalf for the sails. These were questions of fact. If the defendant was the merely legal and registered owner of the vessel, holding the title for himself as security or in trust for others, and not in point of fact in possession of and con-

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trolling her, either as to her destination and employment, or the proceeds of it, he would not be liable. The legal and record title does not of itself decide the question of liability for supplies furnished to a registered vessel. The question is, to whom was the credit given; and the law adjudges it to have been given to the person in actual possession of the vessel, who controls her operations, receives her freight and earnings, and directs her destination. So, also, conceding the defendant to have been in possession and to have sustained such a relation to the vessel as owner as to be responsible for necessities furnished for her use, if the contract for the sails was made with, and the credit given to, Pelletier, there was no foundation for the plaintiff's claim. And again, it was undisputed that Pelletier ordered the sails. He was not the master of the vessel, and had no implied authority as such to bind the defendant. He was a witness for the plaintiff, and testified that he was the owner. He was advertised as proprietor; and there was no evidence to connect him with the vessel, except as owner and proprietor. He was that or nothing. There was, therefore, no implied authority in him.

The further and remaining question was whether Pelletier was expressly authorized by the defendant to contract with the plaintiff for the sails on his responsibility. If he was without express authority, the defendant would not be bound. Even though the defendant were in possession of the vessel, and actually received the sails contracted for by Pelletier voluntarily, he would not be bound to account for them if there had been no previous request on his part. The rendition of services at the request of one party, beneficial to another, without a previous request from the latter, does not raise an implied promise on his part to pay for them.

It is thus seen that the liability of the defendant depended upon certain conclusions of fact, there being no controversy as to the law of the case, at least as far as the rights of the plaintiff were affected. The plaintiff had a verdict,

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which could only have been warranted by a finding: 1st. That the contract was not made with, and the credit given to, Pelletier exclusively. 2d. That the defendant was in actual possession of the vessel, controlling and managing her movements, interested in her voyage, and directing what should be done with her in all respects as her owner, when the sails were furnished; or that he expressly authorized Pelletier to contract for the sails on his responsibility.

The supreme court had the undoubted power and right to examine the evidence at large, and upon the whole case, including the law and the facts, to set aside the verdict and grant a new trial. That court could, from the evidence, reach different conclusions of fact from those found by the jury. In reviewing trials, its power is to pass upon questions of fact as well as law, whilst this court is confined to the correction of errors of law only. Having no power to review any question of fact determined in the subordinate courts, when a new trial has been granted we are obliged to affirm the order if it can stand consistently with any view to be taken of the evidence given at the trial, where it has been by jury. (*Hoyt v. Thompson's Ex'r*, 19 N. Y. Rep. 207; *Sanford v. The Eighth Avenue Railroad Company*, 23 N. Y. Rep. 343.) We are in this position in the present case. The jury found certain facts, and predicated a verdict upon them. Upon an examination of the evidence at large, and upon the whole case, the supreme court has ordered a new trial. It has reached different conclusions of fact from those found by the jury; and an examination of the case shows that those conclusions are not wholly unsupported by the evidence. Indeed, such examination, instead of leading to the conclusion that the order granting a new trial is not to be justified by any view to be taken of the proof given, plainly shows that the plaintiff established a defense by the clear preponderance of testimony. The evidence tended strongly to show that the plaintiff contracted with Pelletier for the sails,

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and upon his credit; that although the defendant held the legal title to the vessel, Pelletier was the equitable owner, in possession, controlling and managing her, directing her destination, and having the sole right to receive her freight and earnings; and that he ordered the sails on his own responsibility, irrespective of any actual authority from the defendant. It is enough, however, that the supreme court might have taken this view of the evidence.

As we are without power to review questions of fact determined in the subordinate courts, we have no recourse but to affirm the order granting a new trial. The plaintiff, instead of appealing from the order and stipulating for final judgment in case it should be affirmed, ought to have gone down to another trial. But we have no power to give the case that direction.

The order granting a new trial must be affirmed, and judgment absolute rendered against the appellant.

MULLIN, J. This cause was tried by a jury, and a verdict rendered for the plaintiff. The defendant's counsel moved, at the special term, for a new trial, which motion was denied. On appeal to the general term this order was reversed, and a new trial granted. It was held, in *Sanford v. The Eighth Avenue Railroad Company* (23 N. Y. 343), that when the trial is by jury we have no power, under the existing rules of law, to review any question of fact determined in the subordinate courts. In this case, therefore, we should be obliged to affirm the order granting a new trial if that order could stand consistently with any view to be taken of the evidence given at the trial.

In that case I infer that no questions of law were involved; that the motion for the new trial was made on the facts only. In this case there are questions of law as well as of fact, and we must examine both before we can reverse the order of the general term.

The defendant's counsel objected to evidence offered on

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the trial by the plaintiff in reference to the transactions between Pelletier and Babbridge & Valentine, and between Pelletier, Overman & Grunn and Wheeler, and his objections were over-ruled and the evidence was received. The evidence was competent, and therefore properly admitted. The questions for the jury to determine were, 1st: Was Wheeler owner and in possession of the vessel when the order for the sails was given by Pelletier? If he was owner, then, 2d. Was Pelletier his agent in ordering the property?

The defence denied even nominal ownership by the defendant when the sails were ordered, but insisted that Pelletier was the real owner, and the nominal title at that time was in Babbridge & Valentine. And that after the defendant obtained the nominal legal title, Overman & Grunn had an interest in the vessel, and in the liabilities existing against her. It was impossible to ascertain who was liable for supplies, without an inquiry into the transfer of and dealings concerning the ship by the several parties connected therewith. When the facts were all out it might be that many of them were irrelevant or otherwise incompetent, and should have been stricken out. No motion to strike out was made, and the defendant cannot now complain if such matters are now found in the case. It was impossible when the evidence was offered, for the court to separate the legal from the illegal, and it was his duty therefore to admit the whole, subject to the right of the counsel to move to strike out that which was illegal.

The defendant's counsel moved for a non-suit, which motion was denied. When the plaintiff rested the second time there was evidence sufficient to carry the case to the jury. The defendant was shown to be the legal owner; he had hired the captain, agreed to pay for supplies, and Pelletier had given evidence which might be construed as proof of authority from the defendant to him to order the sails from the plaintiff. It is true, much of this evidence related to a day subsequent to the order. But the bill of

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sale of eight-ninths of the vessel from Pelletier to the defendant, bears date the 31st December, 1852, while the order for the sails was not given to the plaintiff until about the middle of January following. If the plaintiff was found to be owner from the 1st January, the other evidence in the case might justify a verdict for the plaintiff. It is sufficient for our present purpose that there was some evidence tending to prove the defendant liable.

If I am right in regard to these legal questions, it follows that the general term must have granted the new trial on the evidence; and I propose to inquire very briefly, whether within the rule laid down in *Sanford v. The Eighth Avenue Railroad Company*, cited supra, in any view of the evidence the order granting a new trial can stand.

While it is true that there is some evidence to support the verdict of the jury, it is equally true that a verdict for the defendant would have been not only justified, but if rendered, could not have been set aside as against the weight of evidence, or as unsupported by it.

It was indubitably established that Pelletier was the real owner of the vessel, both before and after the transfer to defendant; that the defendant had no interest in his or her earnings; and that they belonged to Pelletier, or those to whom he transferred them. Under these circumstances, the defendant was not liable for supplies, unless purchased by him, or by some person authorized by him. (Abbott on Shipping, 32; *Leonard v. Huntington*, 15 J. R. 298; *Wendover v. Hogeboom*, 7 J. R. 308; and cases cited in note to page 33 of Abbott on Shipping.)

When supplies are furnished to a ship, the person furnishing them has three remedies to which he may resort in order to collect the price. 1. He may enforce them against the ship. 2. Prosecute the owner or person in the actual possession and bound to furnish supplies; and 3. He may sue the person ordering them. If the vendor will not adopt the first of these three, an action must be brought against a party liable to him.

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We have seen that mere ownership alone does not subject the owner to liability, and for very obvious reasons. It is competent for the owner to charter the ship to another, and while the person hiring is in possession and use of the vessel there would be no justice in subjecting the owner to liability. As well might the owner of a house be liable for repairs or supplies while it is occupied by a tenant. (*Cutler v. Thurlo*, 20 Maine, 217; *Abbott on Shipping*, 35 and note.)

The hirer is *pro hac vice* owner, and alone liable. (Cases cited *supra*; *Sherman v. Fream*, 30 Barb. 478; 8 John. Rep. 272.)

Upon the same principle it has been held that a purchaser of a vessel, after his contract of purchase, and before the title is actually transferred, is liable for supplies, if he is in possession of her at the time, and the person in whom the legal title is, is not liable. (*Hussey v. Allen*, 6 Mass. 163; *Portland Bank v. Stubbs*, *id.* 422; *Mulden v. Whitcock*, 1 Cowen, 290; 11 Mass. R. 34.)

The question is then brought down to this: Was the defendant in the actual possession of the vessel at the time the sails were ordered; or was Pelletier his agent, and as such, authorized to bind the defendant? If the evidence does not support either of these propositions, then the new trial was properly granted.

There is some proof of possession, not of actual occupation by the defendant, but of acts of ownership after the transfer to him by Babbridge & Valentine, but none as early as the middle of January. The agreement between B. & V. and the defendant for supplies, bears date the 28th January, 1853. The bargain with the captain was on the 8th February. The defendant's claim to the vessel made in the United States district court for the southern district of New York, was sworn to on the 28th February. The oath of ownership was taken on the 4th February. Aside from these acts, there is no evidence that the defendant had anything whatever to do with the ship. The learned

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justice who tried this cause instructed the jury that they might take these facts into consideration in passing on the question whether the defendant was in the actual possession of the ship. The evidence was competent upon that question. But it was met, and I think overcome by the undisputed evidence of both the defendant and Pelletier, that the defendant was not in possession, and did not control the ship.

Upon the other proposition, whether Pelletier was authorized to bind the defendant for supplies, I think the evidence is still more unsatisfactory. The only evidence in support of it, is the statement of Pelletier that "after this transfer (that of the title to the defendant I suppose is meant), it was understood between the defendant and me that I was to go on with the vessel, and get her ready for sea." From this statement, the inference as already suggested, might be drawn, that he was thereafter acting as agent of the defendant; but the same witness repeatedly says that the defendant had no interest in the vessel or her earnings. This being so, it would be doing violence to language, to say that the witness intended to testify to an agency. On the contrary, he says that he ordered the sails, wanted credit, and offered his note, which the plaintiff refused.

The proof in the case establishes the liability of Pelletier for the property. He was the actual owner of the vessel, entitled to all her earnings, and was the only person who was interested in furnishing supplies. It was Pelletier who ordered the goods, whose responsibility was relied on, until he became insolvent, and then the attempt was made to make the defendant liable.

I think the new trial was properly granted, and, under the stipulation, judgment absolute rendered in favor of the defendant, with costs.

All the judges concurring, judgment affirmed.

Statement of case.

ISAAC CARPENTER and ALFRED A. SUTTON v. MARY G. WARD.

A party who cross-examined a witness as to a collateral matter, is concluded by his answers. He can not draw out collateral statements from the witness, and for the purpose of discrediting him, show that on some other occasion he stated differently.

To entitle the examining counsel to show the discrepancy, for the purpose of impeaching the credibility of the witness, it must either appear that the testimony related to a point *material* to the issue on trial, or to a fact brought out on the examination of the adverse counsel.

THIS is an appeal by the defendant from a judgment of the supreme court, in the second district, in favor of the plaintiff, affirming a judgment entered on the report of a referee. The action was brought to recover the value of a quantity of lumber and coal, alleged to have been sold and delivered to the defendant by the plaintiffs, and was tried before a referee, by whom the following facts were found: That the plaintiffs, during the year 1854, were coal and lumber merchants at White Plains; and from June, 1854, to January, 1855, the defendant was the owner of certain real estate, situate in the town of Scarsdale, known as the DeLancey property. In the fall of 1854 an addition was built to the house on said real estate, and the barn repaired. The addition was built and repairs made by one Hanbold, pursuant to the direction of William Ward, the brother of the defendant, and her general agent, having power to contract debts for her during the years 1853 and 1854. Hanbold obtained the lumber with which the additions and repairs were made from the plaintiffs' yard, between the 8th and 21st of October, 1854, and it was worth \$132.73. Hanbold, on at least two previous occasions, had obtained lumber of the plaintiffs, by the direction of the defendant's general agent, once upon a written, and once upon a verbal order, which was used in the repairs upon the defendant's property, and for which the plaintiffs were paid. That in November, 1854, the plaintiffs sold and

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delivered coal to the defendant of the value of \$24.61, and upon these facts the referee ordered judgment in favor of the plaintiffs for the amount claimed. On the trial of the cause before the referee, the defendant contested her liability to pay for the lumber, and sundry questions were raised. The general features of the case, as disclosed by the evidence, are as follows: The defendant was the owner of certain real estate in Scarsdale, Westchester county, known as the DeLancey property, between June, 1854, and January, 1855; and her brother, William Ward, was, during the years 1853 and 1854, and still is, her general agent, with power to contract debts for her. In the fall of 1854, William Ward, the agent, directed a man by the name of Hanbold to put the house and barn on the DeLancey property, owned by the defendant, in order and repair. In pursuance of this direction, Hanbold procured of the plaintiffs, lumber for that purpose, and with it put an addition to the house and repaired the barn. The lumber thus obtained was charged on their books by the plaintiffs to William Ward, and he afterwards recognized the bill, and agreed to pay it. During the time that the addition to the house and repairs to the barn were going on by Hanbold, the defendant was at home and had knowledge of the fact, and made no inquiry or objection. There were divers exceptions to the admissions of evidence, but they were of no importance, except two, the facts in regard to which are sufficiently stated in the opinion of the court. There was also a motion to non-suit, at the close of the plaintiffs' testimony, which was renewed at the close of the case. Both motions were denied, and the defendant in each case excepted.

The theory of the plaintiffs' case was that the lumber and coal in question were procured under the authority and direction of the plaintiffs' general agent by Hanbold, instructed to procure them by such agent. The existence of such general agency was admitted on the trial. The instructions by the general agent to Hanbold were sworn

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to by the latter and not contradicted by Ward, the general agent, who was sworn as a witness on the trial. It was further shown that the lumber was applied to the construction or repair of buildings on real estate owned by the defendant.

John H. Reynolds, for the plaintiffs (respondents).

Samuel E. Lyon, for the defendant (appellant).

HOGEBOOM, J. I discover only two exceptions in this case which require special remark. The first is that taken to the ruling of the referee in excluding Exhibit C, which is the examination of the witness Hanbold on a former occasion in supplementary proceedings. At that time he testified that neither William Ward nor the defendant was in anyway or manner interested with him in the manufacture of powder at the Bronx River Powder Mills in the county of Westchester. This was supposed to be inconsistent with what he had testified to on the trial of the present cause, to wit: that he was at the time of obtaining the lumber in question managing the powder works *with Miss Ward*. But to entitle the examining counsel to show this discrepancy for the purpose of impeaching the credibility of the witness, it must either appear that the testimony related to a point *material* to the issue or trial, or to a fact brought out on the examination of the *adverse counsel*. It was neither. It was unimportant to the case to show whether Miss Ward had or had not any business connection with Hanbold in regard to the powder works. Such a fact could neither charge nor discharge the defendant with or from liability for the lumber; which liability rested upon the purchase of the lumber by the supposed authority of the general agent and its application to buildings of which she was confessedly the owner. The proposed contradiction was therefore to a collateral fact. It was further a fact drawn out on the examination of the

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defendant's counsel, and not being material in itself to the issue joined in the action the answer of the witness was not open to contradiction. The impeachment of the witness does not come within the rule quoted by the defendant's counsel, which is as follows. "The credit of a witness may be impeached by proof that he has made either verbal or written statements out of court contrary to what he swears at the trial, provided he has been previously cross-examined as to such alleged statements, and provided that such statements are upon a point material to the question in issue." (2 Phillip's Evidence, Edwards' edition, 958. *Patchin v. The Astor Mutual Ins. Co.*, 3 Kernan, 268.)

The other exception was to the ruling of the referee allowing, on the application of the plaintiffs, certain testimony to be stricken out which the plaintiffs had themselves offered, and which the referee had received under objection, but not under exception. This testimony related to the *declarations* of the defendant's agent that he had paid for certain bills of lumber procured on a former occasion by Hanbold on the authority of such agent. Strictly speaking, perhaps, such declarations, not being within the direct scope of the agency, nor made in the execution of the agency, might be regarded as of doubtful propriety. But no exception was taken to the decision of the referee allowing them to be introduced in evidence. They were therefore not open to review in this court. But the plaintiff supposing them to be incompetent subsequently asked to have them struck out, and the referee granted the motion, and the defendant excepted to the decision. I do not think this was error. The testimony, if it had remained in the case, though in its effect prejudicial to the defendant, was not open to any allegation of error on her part. Its subsequent exclusion could not work her any legal injury. It is said, however, that by its introduction the defendant had acquired the right to impeach Hanbold in reference to the subject matter of it, which right was impaired and destroyed by its subsequent exclusion. But to this view

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there are I think two answers: 1st. that there is no evidence contradicting Hanbold on that point; and 2d. That the right to impeach Hanbold was by the referee expressly reserved to the defendant.

The other exceptions are of minor importance, and are not well taken. And some of them are not only untenable but frivolous.

The motion for a non-suit was properly overruled; there being sufficient evidence for the consideration of the referee. The other exceptions require no remarks. The judgment should be *affirmed*.

WRIGHT, J. The facts found by the referee fully justified the judgment. In October, 1854, the defendant was the owner in fee of certain real estate in the county of Westchester known as the DeLancey property. An addition was built to the house upon the property, and the barn thereon repaired. One Ernst F. Hanbold erected the addition and made the repairs, by direction of William Ward, a brother of the defendant; who during the years 1853 and 1854 was the general agent of the defendant, having power to contract debts on her account. Hanbold obtained the lumber with which the addition and repairs were made, from the yard of the plaintiffs, who were coal and lumber merchants, at White Plains; and the lumber so obtained was of the value of \$132.73. Between the 2d September 1854 and the 9th November 1854, the plaintiffs' sold and delivered coal to the defendant, and at her request, amounting in value to the sum of \$24.61. It cannot be plausibly pretended, upon these facts, that the plaintiffs' were not entitled to recover the amount of the lumber and coal bill.

Thus the case stood upon the facts found by the referee. The defendant, however, moved for a non-suit upon the whole case, which may raise the question in this court whether there was *any* evidence tending to establish the facts found. On this point there is no difficulty whatever. It was conceded that the charge for coal was right; and

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the lumber bill, only, was disputed. It was admitted by the defendant that she was the owner of the DeLancey property between June 1854 and January 1855, and that William Ward, her brother, during the years 1853 and 1854, was, and at the time of the trial still was, her general agent and had power to contract debts for her. It was shown that in the fall of 1854, William Ward, the agent, directed a man named Hanbold to put the house and barn on the DeLancey property, owned by the defendant in repair. In pursuance of this direction, Hanbold procured of the plaintiffs lumber for that purpose, (which is the lumber bill in question,) and with it put an addition to the house and repaired the barn. The defendant was at home at the time, and had knowledge of the fact that these improvements were going on, on her property, and made no enquiry or objection. Hanbold was the principal witness on the part of the plaintiffs in respect to the circumstances under which the lumber was purchased and put upon the house and barn and he testified to the express direction of William Ward, the defendant's agent, to him, to make the improvements—the procuring of the lumber from the plaintiffs for the purpose, and the subsequent recognition by the agent, of the correctness of the bill; and although Ward himself was sworn as a witness, there was no attempt to contradict Hanbold in what he testified to as to Ward's directions to make the improvements, or to disprove Ward's agency. There was, therefore, not only slight, but abundant evidence, if credited, to justify the referee's findings of fact, and his refusal to non-suit. Indeed the defence was principally confined to an attempt to discredit the plaintiffs' witnesses, without offering, or attempting to offer any affirmative proof in denial of Ward's agency in the management of the defendant's estate, or his direction to Hanbold to make the improvements; nor that in pursuance of these directions, Hanbold procured the lumber in dispute from the plaintiffs, and made the repairs as he was directed, with full knowledge of the defendant.

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On the cross-examination of the plaintiffs' witness Hanbold, by the defendant's counsel, he was made to testify that he was managing the powder mill works on the Bronx river with the defendant at a time anterior to the repair of the house and barn on the DeLancey property, and that he had got lumber from the plaintiffs, on two several occasions, by direction of Mr. Ward, for repairing the powder mill and the dam; that Ward, as the agent of the defendant, bought the salt petre to make the powder, and it was understood that the witness and the defendant should divide the profits; and he believed they were so interested together at the time the lumber in question was bought of the plaintiffs. The defendant's counsel then proposed to introduce in evidence an affidavit of Hanbold, purporting to have been taken by the county judge of Westchester, on the 20th of November, 1854, on some occasion not disclosed, in which it was stated that the defendant was never in any way or manner concerned or interested with him in the manufacture of powder at the Bronx River Powder Mills; that in April, 1852, the defendant purchased the powder works at public auction, since which time the affiant had been the lessee of the works, and William Ward, acting as the attorney of the defendant, had made him frequent advances of money and merchandize, which he had from time to time in part repaid, with interest thereon; and that Ward's connection with him was entirely of a friendly and neighborly character. This paper was objected to as evidence, and ruled out by the referee. The question was properly decided. The only object of introducing the paper was to show that Hanbold, on some occasion, in court or out of court, as late as November, 1854, had stated that the defendant had no interest whatever, or never had, in the powder mill business, with the view of impeaching the credibility of the witness. This could not be done. A party who examines a witness as to a collateral matter, (and this was clearly so,) is concluded by his answers. He can not draw out collateral statements from the witness,

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and, for the purpose of discrediting him, show that on some other occasion he stated differently.

It appears that when Hanbold got the lumber from the plaintiffs, Ward, the agent, was absent. After his return, and after the lumber had been obtained and put into the defendant's buildings, with her knowledge, and without inquiry or objection, Hanbold had a conversation with Ward in respect to the transaction, which was proved by the plaintiffs, and objected to by the defendant as irrelevant, but no exception was taken to the ruling of the referee. At a subsequent stage of the case the plaintiff moved to strike out the evidence of the declarations of Ward made after the lumber and coal had been delivered. This motion was resisted by the defendant, and granted by the referee, and the defendant excepted. The exception is frivolous. The motion itself was entirely unnecessary; for although the evidence may have been improper when received by the referee, there was no exception taken by the defendant to its admission. Whether the referee had or had not power to strike out the testimony, the exception can not avail the defendant, as it was evidence in favor of the plaintiffs, and she could not be prejudiced by the exercise of the power. Remaining on the record could not possibly have helped the defendant's case; and if prejudicial, had it remained she could have made no question in respect to it, as there was no exception to its admission. I entertain no doubt, however, that the referee had the power, under the circumstances in which it was exercised, to grant the motion.

The judgment should be *affirmed*.

All the other judges concurring, judgment affirmed.

Statement of case.

THE BUFFALO CITY BANK v. THE NORTH WESTERN INSURANCE COMPANY.

The schooner *Europa*, owned by B., being at Chicago, laden with a cargo of wheat, B. procured the defendant to insure her freight-list at \$1,500, which was about its amount, on a voyage to Buffalo. The vessel and cargo were also insured by other companies, by B. the owner. During the voyage, the vessel went ashore in a storm, at a place where there was no port, and went to pieces, becoming a complete wreck. B. on the same day made abandonment of the different subjects of insurance to the respective underwriters, which were accepted. The insurers of the wheat subsequently saved about three-fourths of the wheat in a damaged condition.

Held, that B. having abandoned, as to the freight-list, as for a total loss, and the defendant having accepted the same, such acceptance was conclusive upon it, and the company could not object that the loss was not total, nor that for any other reason, it was not a case for abandonment.

Held, also, that the defendant having accepted the abandonment of the freight-list as for a total loss, the plaintiff was entitled to recover the full amount of the freight, the same as if the voyage had been completed, and not merely to freight *pro rata itineris*.

ACTION on a policy of insurance on freight, the plaintiff suing for the interest of Elijah K. Bruce, the assured, whose right it acquired by assignment, subsequent to the loss. The schooner *Europa* being at Chicago, laden with a cargo of 16,758 bushels of wheat, Bruce, the owner, procured the defendant to insure her freight-list at \$1,500, which was about its amount, on a voyage from Chicago to Buffalo. The schooner proceeded on her voyage until about six miles from Buffalo, when she went ashore in a storm, at a place where there was no port, and went to pieces, becoming a complete wreck. The vessel, cargo and freight all belonged to Bruce, and each was insured in different companies, the defendant being insurer on the freight-list only. Bruce, on the same day, made abandonments of the different subjects of insurance to the respective underwriters, which were accepted. The insurers of the wheat, the Mutual Insurance Company of Buffalo, sent

persons to the wreck, and saved and caused to be brought to Buffalo on other vessels, 12,349 bushels in a damaged condition. The defendant insisted that the plaintiff was not entitled to recover for a total loss, but only *pro rata*; that the insurers on the wheat having, by the abandonment, became its owners, and having consented to receive the portion which was saved at an intermediate point, thereby became liable to the owners of the vessel for the freight to that point, and hence that the plaintiff could only recover for a partial loss. The judge, Hon. J. A. VERPLANK, of the superior court of Buffalo, before whom the case was tried without a jury, held otherwise, and gave judgment for the plaintiff for \$1,500 and interest, which judgment was affirmed at a general term. The defendant then brought the present appeal.

J. C. Churchill, for the appellant.

John Ganson, for the respondent.

DENIO, C. J. Freight, which is the compensation which the owner of the vessel is to receive for carrying the goods, is, by the law of England, and of this state, a distinct subject of insurance. In adjusting the indemnity under contracts for insurance, a diversity has arisen between the courts of the two countries. In England freight is considered so far an incident of the ownership of the vessel that where the latter is lost, or so much damaged as to warrant an abandonment in the course of the voyage, the insurers are entitled upon abandonment to the benefit of the contract for carrying the goods, and if freight is subsequently earned for carrying property taken on board at the commencement of the voyage, they can claim it as an incidental advantage acquired by them by means of the abandonment. As where a vessel has been stranded, and in that state abandoned to the insurers, and is afterwards gotten off, repaired and sent on her voyage, and delivers the cargo, thus earning the

freight, it belongs to the underwriters on the ship and not to the insurers of freight. (*Case v. Davidson*, 5 Maule & Selw. 79; affirmed in the Exchequer Chamber, S. C. 2 Brod. & Bing. 379.) The rule has been settled otherwise in this country, where it is held that the insurers of the vessel are entitled only to what the ship may actually earn subsequently to the abandonment. (*The United Insurance Company v. Lenox*, 1 John. Ca. 377, and note in the edition of 1846—affirmed in error, 2d id. 443; 3 Kent's Com. 333.) The rule thus established has been subsequently adhered to in this and in other states, as will be seen by the foregoing references. Upon the loss and abandonment of the ship in this case, the underwriters upon it acquired title to nothing except the *debris* of the wrecked vessel. If the incipient freight, or any part of it, has been saved by the acts of the owners of the cargo, or their transferees, the insurers of cargo, by their receiving it at the place where the vessel went ashore, or by its being taken to its destination in another vessel, the abandonees of the schooner have no concern with it, and the abandonees of freight are deprived of nothing. It is argued that the defendant ought not to pay the full sum insured because the *pro rata* amount which the owner of the cargo ought to pay would have been saved to Bruce, as the ship owner, if he had not abandoned the vessel. This might have been secured if the abandonees of the vessel fully represented Bruce in all his rights concerning it; but we have seen that they did not, for they had no concern with the incipient freight, and, as the vessel did not contribute to the earning of freight after the abandonment, if any was earned, these abandonees obtained no interest in the freight whatever.

Nor did the abandonment of the cargo to the underwriters upon it affect the present question. They took the part of the wheat which was saved subject to any claims upon it for *pro rata* freight, if there were any such claims. (*United Ins. Co. v. Lenox*, *supra*—per RADCLIFF. J., at p. 379.) It is said that the abandonment of cargo by Bruce

was not one of the things which the defendants insured against, which is very true; but the winds and waves which caused the vessel to go ashore, and which produced the injury to the cargo and justified its abandonment, and thus prevented the earning of freight was the very peril which the defendants undertook to indemnify Bruce against. It was the occurrence of the storm which gave rise to the state of things which authorized Bruce to abandon all the several subjects insured to the respective insurers. These insurers, by force of the abandonment, took whatever property or interest remained in the subjects insured, but they did not otherwise represent Bruce. For example, the insurers upon the vessel acquired title to the broken planks, spars and iron which could be collected from the wreck. The insurers upon cargo took title to the damaged wheat subject to the payment of any freight which under the circumstances it ought to bear, and the defendants as insurers of freight succeeded to all claims for freight which Bruce would have had against the owners and the cargo, if it had been owned by another person.

It is further urged that the loss of freight was not so great as to entitle Bruce to abandon it to the defendant. The judge has, however, found that the abandonment was accepted. This divested Bruce of the right to proportionate freight, and conferred that right, if it existed in any one, upon the defendant. But I think there was a just occasion for abandonment. The vessel had become a total wreck at an intermediate point which was not a port, and vessel, cargo and the right to freight were *prima facie* lost. No freight had been earned, and the vessel which was to have earned it was broken to pieces. If any could have ever been earned it would not have been in any natural, but in an exceptional, way, as by the owner of the cargo accepting it where it then was, or by the abandonee of the ship getting it to port in some other way. An abandonment is said to be justifiable for anything which, in the course of the voyage, constitutes *at that time* a total loss.

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If anything subsequently occurs, as a recapture in the case of a vessel captured, or getting a cargo to port in another vessel, it is the good fortune of the underwriters, but does not affect the legality of the abandonment. (*Holdsworth v. Wise*, 7 Barn. & Cress. 794; 14 Eng. C. L. 129.)

I conclude, therefore, that the judgment of the superior court of Buffalo was right.

HOGEBROOM, J. This is an action upon a policy of insurance upon the freight-list of the schooner *Europa* for \$1,500, effected with the defendant by one Bruce, from whom, through an intermediate assignee from him after the loss, the plaintiff claims title. Bruce took out separate policies in separate insurance companies on the vessel, cargo and freight respectively. The voyage was from Chicago to Buffalo, and shortly before reaching Buffalo, and distant about six miles therefrom, the schooner went ashore and was lost. No question is made but that she was lost by some of the perils insured against. No question can be made, I think, but that there was a total loss, at all events, of the vessel. The fact found is, that she "was by the force of the winds and the waves, driven ashore where there was no port, and there went to pieces and became a total loss." She was thereupon promptly abandoned to the underwriters, and the abandonment was accepted. The cargo was also, on the day of the disaster, abandoned to the underwriters, and such abandonment was accepted. A portion of the cargo, about three-fourths thereof, was subsequently recovered by the underwriters, and taken by them in other vessels to Buffalo, the port of destination. On the same day also, that the disaster occurred, the contract of affreightment and the freight-list were abandoned to the defendant, and the defendant accepted the same. These facts are all found in the case, and no exception is taken to them. The only exceptions in the case are to the finding and decision of the court, that the plaintiff was entitled to recover the whole amount of the freight covered

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by the policy of insurance, to wit: \$1,500 and interest; whereas, the court should (as it claimed) have decided that the plaintiff was only entitled to recover for a partial loss; and secondly, that the court decided as a question of law on the facts found that the plaintiff was entitled to recover as for a total loss.

The positions taken by the defendant upon this appeal are, as I understand them, 1st. That there was not in fact a total loss of the cargo, or of the freight, and no such acceptance of an abandonment as would extend the right of the insured to recover beyond his actual loss. 2d. That if there was a total loss of the freight, or one which under the acts of the parties must be treated as such, it occurred by the acts or omissions of Bruce, for which the defendants are not liable.

I. That there was a total loss of the vessel, and an effectual abandonment of her as such to the underwriters, is established by the proof in the case, and found by the court which tried the cause, and is not now open to further examination here. But as the vessel, the cargo and the freight are distinct interests, it is a possible circumstance that a total loss of the vessel would not necessarily involve a total loss also of the cargo and of the freight. In one sense, there was not a total loss of the cargo; for of the 16,000 bushels of wheat with which the vessel was laden, 12,000 bushels reached Buffalo, though in a damaged condition, notwithstanding the disaster. But if the question in this case was as to the right to recover for the cargo as a total loss, I do not see how it could be effectually disputed. It affirmatively appears that the underwriters accepted the abandonment of the cargo, and this implies a surrender of it by Bruce into their possession, and complete control of it by them. It was abandoned as a total loss, and they accepted it as such. They took possession of it, and themselves caused it to be taken to Buffalo. It was an act performed for their own benefit and their own indemnity. The wheat so taken to Buffalo belonged to

them, and was at their disposal. They could not have compelled the owner or consignee to receive it; nor could he, after an effectual abandonment, demand it or recover it. He had no right to it. In its damaged condition he would not of course have received it; nor could the carrier, independent of the question of abandonment, have compelled its acceptance by him. It is claimed on the part of the appellant, that there was no valid or sufficient acceptance of the abandonment. The question is not open to debate. The fact is found otherwise, and is not subject to review here. The legal effect of the acceptance of an abandonment, is to concede the right of abandonment and the fact of total loss. They are no longer open to question. They are, in the absence of fraud or mistake, conclusive upon the parties, and the underwriters cannot refuse to pay the whole sum insured. (Philips on Insurance, §§ 1697-1705; Arnould on Insurance, 1172; *Smith v. Robertson*, 2 Dowl. 474.)

The same difficulty meets the defendants on the subject of the freight list. It was abandoned to the defendants, and they accepted it. No fraud, mistake or ignorance of the facts is pretended. Such acceptance is conclusive upon them, as before stated. They have no longer any right to object that the loss was not total, nor that for any other reason it was not a case for abandonment. It is said that the act of the defendant's agent is equivocal both as to the *intent* and the *authority* to accept the abandonment. But the evidence is sufficiently clear to justify the finding of the court, and the fact *is* found—is not the subject of exception, and is not open to controversy. It is claimed that the act of abandonment of the freight, if rightfully made, and whether accepted or not, being made at a point intermediate the port of shipment and the port of delivery, could not entitle the ship owner to full freight as for a completed voyage, but only *pro rata itineris*, and that it was the duty of Bruce, as owner of the vessel, to offer to carry forward the part of the cargo which survived the

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wreck to its place of destination, and earn freight thereon, and if he failed or refused to do so, and thereby the cargo was lost, the defendants are not liable for a total loss, but only for such portion of the loss as they would have been chargeable with if the ship owner had done his duty.

But this is an imperfect view of the relations of the parties and of the facts of the case. When the disaster occurred the freight had not been earned; and if the ship owner improperly terminated the voyage at that point, he had no right to demand any freight whatever. He abandoned the vessel, the cargo, and the freight list. These abandonments were accepted by the underwriters. It is unnecessary, therefore, to consider whether they were lawfully made. The defendants are foreclosed from disputing them, at least that involving the freight list. The effect of such abandonment and acceptance was to put the defendants in Bruce's place as to the obligation to earn freight, and the right to recover therefor. As between themselves and the owners of the cargo, they were probably bound to carry the cargo, or so much as was saved from shipwreck, to the port of destination. But as between them and Bruce, having accepted the abandonment of the freight list as for a total loss, we must treat it as such, and give effect to it accordingly. We must, I think, regard it in the same light as if the voyage had been completed and the freight fully earned. Hence the plaintiffs would be entitled to recover the full amount of the freight.

The judgment of the court below should be affirmed.

All the judges concurring, judgment affirmed.

Statement of case.

PLINY JEWELL v. OLIVER C. WRIGHT and others.

Where a promissory note, made and dated in this state, and payable at a bank here, is negotiated in another state, the laws of New York are to control as to the defense of usury.

And if the note is discounted at a rate of interest exceeding seven per cent., no action can be maintained upon it here.

THIS action was brought to recover the amount of a promissory note made by the defendant Wright to the order of the defendant Dunlap, who endorsed it for the benefit and accommodation of the defendant Taylor; and it was without consideration. It was made and endorsed by Dunlap, and delivered to Taylor at Lockport, N. Y., May 30, 1857, for \$400, payable at Niagara County Bank, at Lockport, one year from date. Taylor took it to Connecticut, and there induced the plaintiff to guaranty it for his benefit, and then endorsed it himself, and procured it to be discounted by Albert Day, at the rate of twelve per cent.; Day reserving out of the face of the note \$48, and giving to Taylor, as the net proceeds of the note, \$352. The note did not bear interest, and this was its first negotiation. The note, after being protested, was taken up by the plaintiff, who brought this action in the supreme court.

At the trial, this state of facts was conceded. The plaintiff then read in evidence pages 618 and 619 of Revised Statutes of Connecticut, of 1849, by consent. After proving the amount due on the note, the evidence was closed. The court thereupon directed a verdict for the plaintiff, subject to the opinion of the court at general term, upon a case to be made. The general term gave judgment for the plaintiff on the verdict. From the judgment entered pursuant to such direction, this appeal is taken.

Argument for Appellant.

Geo. W. Cothran, for the appellant.

I. In determining the validity of a contract purely personal, will the court give effect to the law of the place where the contract was made, or the law of the place where it is, by its terms, to be performed, is the precise question to be passed upon in this case.

1. In contemplation of law, this contract was made in Connecticut, for it was there that the note was first delivered as the evidence of an existing indebtedness. (*Cutler v. Wright*, 22 N. Y. Rep. 472-4.)

2. In general, the validity of personal contracts is determined by the law of the place of making. In fact, it is the universal rule unless the parties stipulate otherwise. (Story on Conf. of Laws, §§ 317, 320, 332, 340; *Curtis et al. v. Leavitt*, 15 N. Y. Rep. 227.)

3. But where the contract, by its terms, is to be performed in a state other than that in which it was made, effect will only be given to the laws of the place of performance.

(a.) Such has frequently been declared to be the law of this State, by our courts. (*Cutler v. Wright*, 22 N. Y. R. 472, 474, 480-9; *Everett v. Vendryes*, 19 N. Y. 436; *Bowen v. Newell*, 13 N. Y. 290; *Curtis v. Leavitt*, 15 N. Y. 14, 85-9, 91, 227, 296, [10]; *Hyde v. Goodnow*, 3 N. Y. 266; *Burckle v. Eckhart*, 3 N. Y. 132; *Lee v. Selleck*, 32 Barb. S. C. R. 522; *Pomeroy v. Ainsworth*, 22 Barb. 120, and 127-9; *President &c. of Bank of Commerce v. Rutland R. Co.*, 10 How. Pr. Rep. 1; *Thompson v. Ketcham*, 4 J. R. 285; *Warren v. Lynch*, 5 J. R. 239; *Thompson v. Ketcham*, 8 J. R. 189; *Fanning v. Consequa*, 17 J. R. 511; *Scofield v. Day*, 20 J. R. 102; *Sherrill v. Hopkins*, 1 Cow. 103; *Martin v. Hill*, 12 Barb. 631; *Balme v. Wombough*, 38 Barb. 352; *Chapman v. Robertson*, 6 Paige Ch. 627; *Le Breton v. Miles*, 8 Paige Ch. 261.)

(b.) It is the doctrine established in the supreme court and circuit courts of the United States. (*Andrews v.*

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Pond, 13 Peters' R. 65; *Cox v. United States*, 6 Peters' R. 172; *Van Reimsdyke v. Kane*, 1 Gall. R. 371; *Emery v. Greenough*, 3 Dall. 370; *Lanusse v. Barker*, 3 Wheat. 101, 146; *Slocum v. Pomroy*, 6 Cranch, 221; *Harrison v. Sterry*, 5 Cranch, 289; *Pope v. Nickerson*, 3 Story C. C. Rep. 465; *Strother v. Lucas*, 12 Peters' Rep. 410, 436, per BALDWIN, J.; *Bell v. Bruen*, 1 How. United States Rep. 169, 182.)

(c.) It has long been the law of England. (*Cooper v. Earl of Waldegrave*, 2 Beavan, 282; *Robinson v. Bland*, 2 Burrow, 1077; *Melan v. Duke of Fitz James*, 1 Bos. & Pull. 138; *Robinson v. Bland*, 1 Black. Rep. 247, 258; *Rothschild v. Currie*, 1 Q. B. Rep. 43; *Thompson v. Powles*, 2 Simons' Rep. 194; *Down v. Lippman*, 5 Clark & Fin. R. 1, 13, 19, 20; *Ferguson v. Fyffe*, 8 Clark & Fin. R. 121; *Pattison v. Mills*, 1 Dow & Clark, 342, 362); and is the law in several of the states.

(d.) It is one of the elementary principles of the law. (Story on Conf. of Laws, §§ 242, 242a, 280; 2 Kent's Com. 606-9, and notes, 9th ed.; 2 Parsons on Contracts, 95, 100, 2d ed.; 2 Fonbl. Eq. R. 5, chap. 1, § 6, and note; Chitty on Bills, 168, 169, 12th Am. ed.; Story on Promissory Notes, § 165; 2 Parsons on Bills, 320; Byles on Bills, 314 to 316, marg. page; Story on Bills, § 147; Bayly on Bills, 249, 5th ed.; Marius on Bills, 75, 89-92, 101-103; Edwards on Bills, 180-182.)

(e.) It is a maxim of the Roman law. "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*"

(f.) It has the general assent of the principal foreign jurists. (Boullenois Observ. 46, page 475, 476, 488; 1 Hertii Oper. De Collis. Leg. § 4, n. 53, page 147, ed. 1737; Voet. ad Pand. Lib. 4, title 1, § 29; 1 Emerigon C. 4, § 8; Voet. de Stat. § 9, chap. 2, § 15, p. 270, ed. 1715; Boullenoies Quest. Contr. des Lois; page 339, &c.; 3 Burge Comm. on Col. and For. Law, Pt. 2, chap. 20, page 771, 772.)

Argument for Respondent.

II. The note having been put into circulation upon a usurious consideration, having been negotiated at the rate of twelve per cent. interest, it is wholly void, and the action cannot be maintained. (3 R. S. 72, § -, 5th ed.)

III. A contract void by the law of the place where made, even though it is to be performed in another state, by the laws of which it would be valid, is by the just principles of international law, void every where, as the courts of no state will enforce the void contracts of another state. (*Hyde v. Goodnow*, 3 N. Y. Rep. 266; *Andrews v. Herriot*, 4 Cow. 510, note a; *Andrews v. Pond*, 13 Peters' U. S. Rep. 65; Story on Conf. of Laws, § 243, and cases cited.)

1. The note in this case was void by the laws of Connecticut, as proved on the trial. (Laws of Conn. in Case, fol. 39 to 41, §§ 1, 2.)

IV. Interest is to be paid according to the law of the place where the contract is made, unless the payment is to be made elsewhere, and then it is to be according to the law of the place where the contract is to be performed. (2 Kent's Comm. 608, and notes, 9th ed.; *Thompson v. Powles*, 2 Simons' Rep. 194; Story on Conf. of Laws, § 305, 291, 292, and cases cited; *Boyce v. Edwards*, 4 Peters, 111; *Cash v. Kennion*, 11 Vesey, 314; *Scofield v. Day*, 20 Johns. 102; *De Wolf v. Johnson*, 10 Wheat. 367, 383; Story on Bills, § 148, and cases cited.)

James S. Gibbs, for the respondent.

I. The promissory note in this case, though dated at Lockport, in this state, and made payable at a bank there, was negotiated at Hartford, in the state of Connecticut. As a contract it had its inception in Connecticut. We therefore say the *lex loci contractus* governs. (Story on Conflict of Laws, § 237.)

II. The reason of the *lex loci contractus* is that every person contracting in a country, is understood to submit

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himself to the laws of the place, and silently to assent to its action upon his contract. (Story on Conflict of Laws, § 261.) So too of its nature and obligation. (Id. § 263.)

III. The question whether a contract is usurious or not, depends not upon the rate of interest allowed, but upon the validity of that interest in the country where made. (7 Paige, 616.) This case of 7 Paige, 616, is precisely in point in this case. A note was made in New Orleans, payable in New York, with 10 per cent interest; held not void for usury. (20 Martin R. 1, cited Story on Conflict of Laws, § 298—cited and approved in 6 Paige, 627, 634.)

IV. The courts of a country are presumed to be the best expositors of its own laws, and of the operation of them upon contracts made there. (Ch. J. MARSHALL in 10 Wheaton, 159; 17 Martin R. 587.)

V. The Revised Statutes of Connecticut, 1849, pages 618 and 619, define and restrain the taking of usury. And the supreme court of Connecticut have placed a construction upon this statute. (27 Con. Rep. page 363.) It appears from the 3d section of that statute that although the amount received for discount, in this case, was greater than the rate of interest allowed by law, the contract was not utterly void by the laws of Connecticut.

VI. Where a loan is made in Connecticut at a greater rate of interest than is allowed by the laws of this state, but no greater than the legal rate in Connecticut, the fact that the note is made payable in this state, will not render the transaction usurious and the note invalid. And it rests with the defendants to show that the transaction is contrary to the laws of Connecticut. (29 Barb. 325; *Cutler adm'r, v. Wright*, 22 N. Y. R. p. 472.)

INGRAHAM, J. It was not denied on the trial of this cause that the note on which the suit was brought was negotiated at a rate of interest illegal, both in Connecticut and New York.

The main question in the case is, whether the laws of

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New York or Connecticut are to control as to the defense of usury. The note was negotiated in Hartford, but was payable at Lockport, in New York.

Nor can it be denied that a contract is to be governed by the laws of the place where it is made, if it is not to be performed according to the terms of the contract elsewhere. (Story on Conflict of Laws, § 282; 6 Paige, 230; 2 Kent's Com. 457; *Davis v. Garr*, 2 Selden, 124.)

But if such note or contract is by its terms to be performed in another state, then the laws of that state must govern. (2 Kent's Com. 460.) This rule was laid down by this court in *Jacks v. Nichols* (1 Seld. 178). The court in delivering the opinion, says: "Concede that the contract was made in Connecticut, if it was to be performed in New York, it must, *prima facie*, be regarded as having been made with reference to the laws of New York." The fact that the note was dated in New York, is alone presumptive evidence that the maker not only resided at the place of its date, but contemplated payment there. For the purpose of charging the endorsers, the makers must have been sought at their residence or place of business in this state. The same is stated in *Curtis v. Leavitt* (15 N. Y. R. p. 9-227), where it is said: "It is a general rule that the law of the place, where contracts purely personal are made, must govern as to their construction and validity, unless they are to be performed in another state or country, in which case their construction and validity depends upon the law of the place of performance." In *Bowen v. Newell* (13 N. Y. p. 290), it was held that the law of the place where the note or draft is payable, governs as to the days of grace allowed upon it. In *Everett v. Vendryes* (19 N. Y. R. p. 436), it was held the law of the place where the bill was payable, controlled as to the liability of the drawer to the indorsee. And in *Culler v. Wright* (22 N. Y. R. 472), it was held that a note made in New York, but dated in Florida, and payable there, was governed by the laws of that place; and it is said the authorities do not leave

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this question in doubt. The same was also held in *Pome-roy v. Ainsworth* (22 Barb. 127).

These cases from our own courts, render it unnecessary to examine any other class of decisions upon this point.

The judgment should be reversed, and a new trial ordered.

DAVIES, J. read an opinion in favor of affirmance. SELDEN, J. was absent.

All the other judges being for reversal, judgment reversed.

Statement of case.

SAMUEL HARRIS and others v. HORACE J. MOODY and JACOB R. TELFAIR.

Goods carried on deck, according to the custom of the trade by steamboats navigating Long Island Sound, and stowed in the usual way, are liable to contribution by way of general average for a loss occasioned by a jettison of other goods necessarily thrown overboard under stress of weather and while subjected to the perils of the sea.

Bank bills of individuals, so carried for them, in a crate, by an express company, which company, by agreement with the owners of the steamboat, pay such owners a fixed sum annually for the carrying of a stated number of portable crates, with the contents thereof, are bound, when saved, to contribute for such a loss.

All property on board the vessel at the time of the jettison, and saved, unless attached to the persons of the passengers, is to be brought into contribution.

Bank bills are to be regarded as property, the goods and chattels of the owner thereof; and in case of loss, the owner is entitled to recover the nominal or par value thereof, in the absence of any proof of depreciation, with the interest thereon.

Bank notes transported by an express company, for the owners, under such an arrangement between it and the owners of the vessel, as is above stated, are to be deemed as paying freight, and therefore as forming a part of the cargo of the vessel.

THIS is an action to recover a parcel of bank bills amounting to the sum of \$1,171, retained by the defendants who claim a lien thereon. Such lien is set up under the following circumstances. The steamboat Connecticut, proceeded on a voyage from the city of New York to Allyn's Point, in the state of Connecticut, on the afternoon and evening of the 17th of October, 1856, and encountered a heavy gale, whereby she sustained great damage, losing her smoke stack and forward mast, and being greatly strained and injured. The storm continued unabated, and it was evident that the vessel would go down, unless she could be brought round; and to do this it was essential and necessary, for the general preservation, to lighten the boat, and in consequence thereof, with a view to general safety a large amount of cargo was jettisoned, by means

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whereof the steamboat was enabled to turn and finally to enter Huntington Harbor in safety, from whence she was brought to the port of New York on the succeeding day. The cargo which was jettisoned was not under cover, but according to the established usage and custom of the trade, by steamboats running between New York and Allyn's Point, was carried on the main deck of the steamer, the space below that deck being, as usual, occupied by the engine, boilers, coal, &c., and by the passengers. Most of the cargo jettisoned was laden upon the upper or main deck of said boat, along each side of the ladies' cabin, and between the stern of the boat and the paddle boxes, being the space according to usage and custom appropriated to cargo. A cabin is built upon the said deck, and occupies a space in the centre of the vessel, and equi-distant from each side of the boat, and between the sides of the cabin and the sides of the boat the said cargo was stowed. The bank bills, for the recovery of which the action is brought, belonged to the plaintiffs, and were by them entrusted and delivered at Baltimore, to Adams & Co., express agents and forwarders, to be by them transported to and delivered at Boston to the plaintiffs' agent. Said bills, at the time of the jettison, were in a crate or case belonging to Adams & Co., which was laden on board the said vessel. By the agreement between Adams & Co. and the owners of said steamboat, the said Adams & Co. were, in consideration of a fixed annual sum paid by them, permitted and allowed to transport on said boat, a stated number of portable crates, with the contents thereof. And the said Adams & Co. made and collected their own charges for the transportation of the contents of said crates from the parties who employed them. The owners of the boat claimed that the said bills were liable to contribute in common with the other property saved, to the payment of the general average loss occasioned by the jettison, and for that purpose returned the said bills, and delivered them to the defendants in this action, who were at the commencement thereof,

in the possession of the same as the agents of the said owners, to secure the payment of the contributing share of such general average loss, for which said owners and the defendants insisted that the said bills are liable to contribute as part of the cargo of the vessel. These facts were agreed upon by the parties to this action, and upon them the judge, at the trial, directed the jury as matter of law, that the plaintiffs were not entitled to recover; and that the defendants were entitled to their verdict, to which ruling and direction the plaintiffs excepted. Thereupon, the jury gave their verdict for the defendants, and assessed the value of the property taken, at \$1,171, and \$134.33 as damages for the detention thereof. And the justice directed said exceptions to be heard in the first instance at the general term of the superior court of New York. That court overruled the exceptions, and gave judgment for the defendants (see 4 Bosw. 210), and the plaintiffs appealed to this court.

John E. Burrill, for the appellants.

Daniel Lord, for the respondents.

DAVIES, J. Two questions are presented for consideration and determination upon this appeal. 1. Whether jettisoned goods stowed on the deck of a steamer are entitled to the benefit of general average. 2. Whether the particular species of property belonging to the plaintiffs in this action, and retained by the defendants, is liable to contribute for the general average loss. These questions will be considered in the order stated.

By the Rhodian Law, as cited in the Pandects, if goods were thrown overboard, in a case of extreme peril, to lighten and save the ship, the loss being incurred for the common benefit, is to be made good by the contribution of all. (3 Kent's Com. 232.). The necessity of the jettison in the present instance, and that the goods sacrificed were

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the price of the safety of the vessel and of those saved, are conceded in the statement of facts. Chancellor KENT, in 3 Com., p. 239, lays down the rule, as deduced from the authorities cited by him, that goods shipped on deck contribute, if saved, to the average loss, but if lost by jettison, they are not entitled to the benefit of general average, and the owner of the goods must bear the loss without contribution; and the reason assigned by him for this rule is that the goods, by reason of their situation upon deck, increase the difficulty of the navigation, and are peculiarly exposed to peril. And a further reason for the rule is stated, that the carrier, in that case, is not responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss. Citing as authorities Consulat. de la Mer, chap. 183; Ord. de la Mar, 3, 8, 13; Emerigon, chap. 12, § 42; *Smith v. Wright* (1 Caines' Rep. 43); *Lenox v. United Insurance Company* (3 John. Cases, 178); Boulay Paty, tome iv, 566; Code de Commerce, art. 421; *Dodge v. Bartol* (5 Green, 286); *Brig Thaddeus* (4 Martin's Louis. Rep. 582); Abbott on Shipping, 5th Am. ed. 578; Story on Bailments, 339; *Johnston v. Crane* (Kerr's N. B. Rep. 356); *Wolcott v. Eagle Ins. Co.* (4 Pick. 582).

Smith v. Wright (supra), was an action to recover the value of goods shipped on deck and ejected. It was proved, in that case, that goods on deck, if lost, are paid for by the underwriters on those goods, without contribution from the assurers of the vessel or other parts of the cargo, and one merchant testified that he once owned goods stowed on deck which were lost by jettison, and being uninsured, he claimed nothing from the owner of the vessel or the other part of the cargo; that he conceived it to be the general understanding that for goods ejected from the deck no contribution is to be made by the owner of the vessel or of other goods. The court held that the owner was not entitled to general average, as the shippers of

goods under hatches and the insurer on the ship and cargo was not liable to contribution, on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation. The point decided in the case was that the carrier was not liable for the loss of goods shipped on deck, when thrown into the sea for the preservation of the ship and cargo. In *Lenox v. United Insurance Company* (supra), the court held that for stores shipped on deck and insured, and thrown overboard to lighten the vessel, the underwriters were liable only for a partial loss, and that a loss of the lading on deck could not be charged as general average. *Cram v. Allen* (supra), was decided on the authority of these cases, and also that of *Dodge v. Bristol* (supra). And the reason assigned for the rule is that goods laden on deck are peculiarly exposed to peril, and increase the difficulty and dangers of navigation.

It is to be observed here, that this rule has only been applied to sailing vessels, and for the sole reason that the lading of the goods on the deck increased the difficulty of the navigation, and it was consequently regarded as unjust that that portion of the cargo which imperilled the vessel and the other parts of the cargo, if thrown overboard, should be compensated for. Its presence in the particular locality was regarded as in some degree the cause of the peril, or at least its destruction was called for to ensure the safety of the residue, by reason of its dangerous locality. This general rule is also enunciated by Abbott on Shipping, at page 78, and he says the reason of the rule, as given by Valin, is that goods so carried embarrass the navigation of the ship. But Valin adds, that he thinks this doctrine should be controlled by the usages of the trade; and, accordingly, that contribution may be claimed for goods thrown overboard from the deck of small coasting vessels or river craft, which usually carry a part of their cargo on deck. (Tom. 2, p. 203; See 1 Emer. 640.) An examination of the cases will show that the rigor of this rule has been greatly departed from, and one adopted more

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in consonance with the habits and usages of trade as now practiced, and the modes adopted for the transportation of freight upon water. It might, perhaps, be sufficient to show the inapplicability of the rule as laid down by Chancellor KENT, to say that it was made and applied exclusively to sailing vessels, and the reason given for its adoption can have no force as applied to ships propelled by steam. That reason was that the goods carried on deck embarrassed the navigation, because thus placed there; that to remove them made the vessel more easily navigable, and thus tended to ensure her safety. No such reason has any application to a vessel propelled by steam. The space under deck of this particular vessel was otherwise appropriated than for cargo; and the parties in this action have agreed that it was the established usage and custom, upon this particular boat, to carry its cargo on the main deck. The reason of the law ceasing, the law itself ceases, and the case might safely, I think, be left here. But an examination of the authorities will show that there are exceptions to the rule, and that even in the present case, if the vessel upon which these goods had been laden, were a sailing vessel, the goods jettisoned would have been entitled to a general contribution. We have already noticed the exception made by Valin, of small coasting vessels or river craft, which usually carry a part of their cargoes on deck. This demonstrates that the rule, as he understood it, applied only to sea voyages. This vessel was in the sound, and usually carried her cargo on deck. These facts, show how inapplicable to her, is a rule made to govern voyages at sea. and especially in reference to vessels navigated with sails. Arnould on Ins. (2 vol. 890) in discussing this doctrine of jettison, observes, that the most important exception is that of goods *carried on deck*, which as they tend to embarrass the navigation, are not contributed for if jettisoned, unless they are so carried according to the common usage and course of trade on the voyage for which they are shipped. On proof however of such usage, they are contributed for if jettisoned

like other goods, and no notice to the underwriters of the existence of such custom is necessary in order to make them liable; they being bound to know the usage of the particular trade. Thus carboys of vitriol, timber on the voyage between London and Quebec, and pigs between London and Waterford, have been contributed for, after jettison, though carried on deck; a usage of trade being proved in each case, so to carry them. The authority cited to sustain the proposition that goods carried on deck, because they tend to embarrass the navigation, are not contributed for if jettisoned, has been already referred to. The authority of Valin for the exception made has already been adverted to. Other cases recognize the same exception. *Brown v. Cornwell* (1 Root Conn. R. 60,) was decided in 1773. The question put to the court in that case was, whether stock, (horses) shipped upon the deck, in case it is thrown overboard, to save the vessel and the rest of the cargo, will entitle the owners to an average upon the goods, &c., shipped in the hold of the vessel, that was saved. The court determined that the law was so, that it did; that although stock upon deck is more exposed to damage, and in a storm exposes the vessel to greater risk than goods in the hold, yet as it is the universal custom to ship goods in the hold, with stock upon deck, when the stock upon deck is thrown overboard for the express purpose of saving from destruction the cargo in the hold, it is but reasonable that the cargo saved should bear a proportion of the loss, which was the price of its ransom. In *Gould v. Oliver* (4 Bing. N. S. 134), it was held that the proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship owner for a loss by jettison. TINDALL, Ch. J., in delivering the opinion of the court, observed that Valin lays it down that the rule in article thirteen, does not apply in respect of boats and other small vessels going from port to port "when the usage is to load merchandise on the deck." The latter

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words of which textwriters give the reason for throwing such case out of the exception, into the general rule for contribution, at least so far as the ship is concerned. He says that as to the authorities in the English courts, there is no one which states directly that goods laden on deck, shall in no case be entitled to contribution. The question, however, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been, that for goods so laden, the underwriters are not responsible. (*Ross v. Thwaite*; Park on Insurance, 26; *Backhouse v. Ripley*, id.) To the same point may be cited *Lenox v. United Insurance Company*, *supra*; and that the owners are not liable, *Smith v. Wright* and *Cram v. Aiken*, *supra*.) But Ch. J. TINDALL proceeds to observe that in *Da Costa v. Edmonds* (4 Campb. 142), it was left to the jury to say, whether there was a usage to carry goods on deck, of the description of those thrown overboard; and the jury having found such usage, the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties, but it appears to fall within the same principle. *Da Costa v. Edmonds*, was an action on a policy of insurance, to recover from the underwriters the value of forty carboys of vitriol, stowed on deck and thrown overboard in a storm, on a voyage from London to Lisbon. It appeared that carboys of vitriol were very frequently carried on the decks of ships, but that it was likewise usual to stow them below, bedded in sand, in which situation they are considered safe. Lord Ellenborough left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on the deck, the underwriters were bound to take notice of it without any communication of such usage, and all they could require was, that these carboys should be properly stowed, in the usual manner. On the other hand, they were not liable, if the

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goods were carried on deck without such a usage; or if they were not stowed there in a skillful and proper manner. The jury found for the plaintiffs, and a rule was refused. The case of *Milward v. Hibbert* (3 Queen's Bench, 120; S. C. 2 Gale & Davis. 142) is quite to the point. It appeared that a quantity of pigs in the course of a voyage from Waterford to London, were thrown overboard from the deck where they were stowed. It was insisted that for the deck-stowed pigs no contribution could be claimed. The court thought otherwise, and Lord DENMAN in delivering its opinion, said: "The practice appears to have been not to lay it down as a rule of law, that for goods stowed on the deck, the owner of them shall be excluded from the benefit of the general average, but to receive evidence of commercial men respecting the usage of the trade and the general understanding of those engaged in it (and in insuring), which may obviously vary, and require from time to time, fresh evidence and different explanations."

I arrive at the conclusion, therefore, that the rule laid down by the earlier writers, as applicable to sailing vessels upon a sea voyage, has no relation to the voyage of the steamer Connecticut, upon its voyage up the sound from the port of New York to that at Allyn's Point; and that if it had, the usage established in this case to stow the goods on deck takes it out of that rule, and brings it within the exception, early recognized and so frequently followed. It results, therefore, that the vessel and cargo of the steamer became liable to contribute to the loss of the goods jettisoned, notwithstanding the same were stowed upon the deck of the steamer. It may also be observed that the rule is universal that goods stowed on deck, if saved, contribute to the general loss, and it is not perceived, on principle, why, as they contribute to the general loss, they should not also be entitled to be contributed for, when destroyed for the general safety.

The next question is whether the particular species of property belonging to the plaintiffs in this action, and

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retained by the defendants, is liable to contribute for the general average loss. By the Rhodian law every thing on board the vessel saved contributed to make up the loss, and in the essay on that law concerning jettison, translated from the digests and code of Justinian, it is said: Several merchants had loaded various quantities of goods on board the same ship, in which were several passengers, both freemen and slaves. In consequence of a violent storm, a jettison became indispensable. It was asked whether all must contribute to the jettison, and whether those must contribute who had goods on board the vessel such as pearls, jewels, &c., and whether there must be a contribution for the heads of freemen, and by what action it could be enforced. It was determined that all must contribute who had an advantage from the jettison, because it was a tribute due by those things which had been preserved, and therefore that the owner of the vessel was bound to contribute for his share; the amount of the jettison must be apportioned according to the value of the goods. It has also been agitated whether an estimation is to be made of the clothes and jewels of every person; and it was unanimously agreed that they should contribute. Arnould thus announces upon what property contribution is to be levied: "All which is ultimately saved out of the whole adventure (i. e., ship, freight and cargo), contribute to make good the general average loss, provided it had been actually at risk at the time such loss was incurred, but not otherwise, because, if not at risk at the time of the loss, it was not saved thereby." (2 Arnould, 921.) Gold, silver, jewels, precious stones and all other small articles of value, unless carried about the person, contribute. He, says Mr. Phillips, thinks that bank notes, being not so much property as evidences of property, ought not to contribute. Nesbett, he observes, considers that they should, and his seems to be the better opinion, for they are convertible into money and are saved by the sacrifice from becoming valueless. (2 Arnould, 923.) Phillips says: As much of the cargo on

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board at the time of making a jettison, or other sacrifice for the general safety, as finally arrives at the port of delivery, or comes to the use of the owner, contributes in general average.

Mr. Benecke says: Passengers ought to contribute for their trunks and luggage, because if cast overboard their value is allowed for. Phillips says, this reason does not appear very satisfactory—a plainer one seems to be, that the baggage is benefitted by the jettison in proportion to its value, in comparison with its whole value at risk, precisely as any other property is so. Emerigon is of the opinion that of right and upon general principles, every thing belonging to passengers, even to their wearing apparel, is liable to contribution. Valin considers the wearing apparel, jewels, rings, ornaments, and in general whatever a passenger habitually wears, uses or carries about his person, during the voyage, including his change of linen, to be exempted from contribution, by the concurrent authority of the ordinances and writers. And Phillips says this seems to be the general practice. He adds: If any part of the baggage is of sufficient value to be worth bringing into contribution, no reason has been given why it should not contribute a part of the contributing interest. The reason for exempting wearing apparel and the like seems to be that the persons of those on board are not brought into contribution, and the exception extends to things which are merely necessary to the person. This discussion shows how universally all that is on board ship, at the time of the jettison, and saved from the impending peril, is called upon to contribute, and the only exception is the persons on board and what is necessarily attached to them. And the reason given for the exemption of the person on board is, that it is impossible to estimate the value of freemen. Slaves, on board at the time of jettison, have been valued, and made subjects of contribution. PARK, Justice, in *Brown v. Stapyleton* (4 Bing. 119), says: The rule is that all merchandize put on board for the purpose of traffic, is

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liable to be brought into contribution, and in merchandize is included all property of great value, unless attached to the persons of the passengers, but property so attached does not contribute. It may therefore be considered as settled by text writers and by judicial authority, that all property, on board at the time of the jettison, and saved, unless attached to the persons of the passengers, is to be brought into contribution.

It remains to be considered whether the parcel of bank bills, belonging to the plaintiffs, are to be regarded as property. That they are so treated by the plaintiffs is apparent from the pendency of this action. The complaint alleges that the defendants have become possessed of and wrongfully detain the following *property* of the plaintiffs: that is to say, one package of bank bills of the value of \$1,171. In the face of this allegation, it will hardly be permitted to the plaintiffs to argue that this package of bank bills is not property, and has no actual value.

In *Turner v. Fendall* (1 Cranch, 116), the supreme court of the U. S. held that money may be taken in execution, if in the possession of the defendant. That it could be levied on and seized, as the goods and chattels of the defendant. In *Handy v. Dobbin* (12 Johns. 220), an execution was issued against the goods and chattels of Handy, by virtue of which the officer seized two five dollar bank bills of the goods of Handy. SPENCER, J., in delivering the opinion of the court, observed that there can be no doubt that the constable, under the attachment, could take any goods and chattels which could be levied on by execution. The authority in both cases is the same. Bank bills are treated, *civiliter*, as money; a tender in them is good, unless it be specially objected to at the time. The question then is narrowed to this: can money be levied on by execution? This court, he says, in *Williams v. Rogers* (5 Johns. 167), intimated strongly their concurrence in the decision of the supreme court of the United States, in 1 Cranch, 133. In that case, all the cases on the point were reviewed, and it

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was held that money could be levied on. We now fully concur in the doctrine then advanced. We perceive no objection in principle why money should not be taken in execution. It is the goods and chattels of the party; and it appears to us to comport with good policy as well as justice, to subject everything of a tangible nature, excepting such things as the humanity of the law preserves to the debtor, and mere choses in action, to the satisfaction of the debtor's debts. (See also *Ontario Bank v. Lightbody*, 13 Wend. 102.) *Sherman v. Wells*, (28 Barb. 403) was an action to recover certain bonds of the state of Michigan, of the nominal amount of \$4,600, entrusted to the defendant as a common carrier, and which were lost by the sinking of a vessel on Lake Erie, upon which they were for transportation. The defendants were held liable to pay the amount of the principal and interest of the bonds. The measure of damages was held to be the face of the bonds, unless the one party prove it to be more, or the other prove it to be less. (Sedg. on Dam. 512-13; 1 Cowen, 240; 10 M. & W. 575; 2 Rawle, 241; 2 Farm. 440; 1 Barn. & Adol. 528; 3 Camp. 476; Angell on Carr. § 285; 13 East, 509; 2 Par. on Contracts, 471.) It would seem, therefore, to be well settled, that bank bills are to be regarded as property, the goods and chattels of the owner thereof; and that in case of loss, the owner is entitled to recover the nominal or par value thereof, in the absence of any proof of depreciation, with the interest thereon. Such being their nature and properties, they were clearly subjected as property, to the burthen of contribution, in the case under consideration.

But it is claimed, on the part of the plaintiffs, that under the arrangement between Adams & Co. and the owners of the steamboat, the bank notes in question paid no freight, and therefore formed no part of the cargo of the vessel. We have seen from the authorities that it is not an essential element in the liability to contribution that the property on board should form a part of the cargo of the

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vessel. The inquiry is, in testing its liability to contribute, was the particular property or thing saved on board at the time of the jettison, and in peril? If so, its duty or liability to make contribution is fixed, except in the particulars heretofore alluded to. It is true that Myers says: "What pays no freight pays no average;" but this doctrine is very generally repudiated, and no authority is cited to sustain it. Even the same author qualifies this, in that he means to exclude from contribution only the wearing apparel and ornaments belonging to the person, by saying: "If a passenger should conceal in his trunk, or about his body, any such considerable sum of money or jewels as would not be suffered without paying freight, he must contribute to the jettison." Here the things concealed formed neither a part of the cargo or paid freight, yet this author declares their liability to contribute. Mr. Stevens says: It would be very unjust that the master, or any other person who had goods on board, should not contribute because he pays no freight.

But it is apparent from the facts presented, in this case, that in truth compensation was paid to the owners of the steamboat, for the transportation of this particular species of property. It is of no moment that the same was made in a fixed sum, for the carrying by the year, the crates with their contents. The payment was in fact made for the transportation of the crates, the parcels therein being placed there for safety and convenience. And it is also a matter of no importance that such compensation or freight was paid in the first instance by Adams & Co. Adams & Co., collected their own charges for the transportation from the plaintiffs and others who employed them, and we cannot fail to see that a portion of these charges must have been a share or proportion of the sum paid by Adams & Co. for the transportation on the steamboat of this particular parcel from the port of New York to Allyn's Point. We conclude, therefore, that this particular parcel of bank bills formed a part of the cargo of.

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this steamer, and freight was paid therefor. It was not necessary, to make it a part of the cargo, that it should have been specifically received, and designated as such, or that to determine the question whether or not freight was paid on it, the sum should have been paid specifically, on this identical parcel. We therefore arrive at the conclusion as well upon principle as authority that the bank bills of the plaintiffs on board of the steamer, for transportation at the time of the jettison, are to be deemed and taken as property, and are bound to contribute, to the general average loss. If these views are correct, the judgment appealed from should be affirmed.

HOGEBOOM, J. The general rule undoubtedly is, that goods shipped on deck, contribute if saved, but if lost by jettison, are not entitled to the benefit of general average. (Abbott on Shipping, part 4, chap. 10, sub. 3; 3 Kent's Com. 240; *Smith v. Wright*, 1 Caines, 43.)

But the rule has its qualifications.

1. It is strictly applicable only to those vessels which are expected to encounter the extraordinary perils of the sea, and not to those which navigate smoother waters, and are comparatively safe from extraordinary exposure. (2 Smith's Leading Cases, 531; Abbott, 481, 482.)

2. The custom and usage prevailing on the particular route navigated, as to the place on the vessel where the cargo is stowed or located, has a material bearing upon the right of the jettisoned cargo to contribution for loss. If by such usage the cargo is stowed on the main deck, and not under cover, then it becomes not only liable to contribution if saved, but entitled to contribution if lost. (2 Smith's Leading Cases, 531; *Gould v. Oliver*, 4 Bingham, N. C. 134; *Brown v. Cornwall*, 1 Root [Cow.] 60; *Barbour v. Bruce*, 3 Conn. R. 9; *Barbour v. Dodge*, 5 Greenleaf [Maine], 286; 22 Pick. 116; 1 Parsons' Maritime Law, 307, 308, 309.) By the terms of the stipulation in this case, it is fairly inferrible not only that the main part of

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the cargo was actually stowed on the main deck, but that it was the only place in the vessel where it could be located. In such a position it was as safe as elsewhere from such perils as vessels of that description on the route which they pursued would be likely to encounter. To deny to a cargo thus placed the right to contribution for loss, in the event of a necessary jettison, would be practically to ignore all title to contribution in all ordinary cases. The rule of contribution would be nullified, and the practice of general average terminated.

The bank notes in question formed a part of the *cargo* of the steamboat. They were packed in a *crate*, and the crate paid freight. Whether such freight was an aliquot part of a fixed annual sum, or a reasonable and customary charge for the particular voyage, cannot alter the question. It was still freight paid for the transportation of the particular crate in which these bills were; and if for the crate, then also for its contents, for it was the contents of the crate and not the crate itself which induced the shippers to undertake the transportation and incur its expense. It was therefore a part of the cargo or burthen carried. It embraced the two important elements which enter into the definition* of cargo, to wit: 1. A part of the load or burthen of the vessel. 2. A part of the articles which produced freight or compensation to the carrier. (Abbott on Shipping, part 4, chap. 10, sub. 12, p. 502.)

Nor were they within any of the various exemptions or exceptions which exclude certain articles from being considered as a part of the cargo, and therefore not liable to contribution.

1. They were not like small parcels of money or evidences of debt, wearing apparel or ordinary baggage attached to the person of the passenger and under his personal care and supervision. They were placed among the ordinary goods, wares and merchandize which constitute the cargo of the vessel, exposed to its perils and sharing its fate. (2 Arnould on Insurance, 888 [Am. ed.]); 1 Phil-

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lips on Insurance, 172 [2d ed.]; 2 do 152; 3 Kent's Com. 210; *Nelson v. Belmont*, 21 N. Y. Rep.)

2. They were within the protection of the contract made between the shipper and the carrier. We are entitled to infer, from the course of the business, that the carriers were entirely aware of the character of the packages conveyed by the express companies, and that they include packages of money as well as other small parcels of value.

3. They were also *property*, within the meaning of that term as applied to articles which might legitimately form a portion of the cargo of the vessel. They were *money* in the ordinary definition of that term, and among the most valuable kinds of property. They pass from hand to hand equally with gold and silver as a part of the ordinary currency of the country. They are liable to levy and sale on execution. (*Handy v. Dobbins*, 12 Johns. 220; *Turner v. Fendall*, 1 Cranch, 33. See *Parsons on Maritime Law*, 323.)

They were something more than mere evidences of debt, and, if not, were none the less articles of personal property. They were subjects of barter and sale, and if improperly detained or lost, could be recovered or sued for in replevin or trover. Nor could their place be supplied, in case of loss, by similar papers without loss of identity. True, evidence of the loss might in some cases be successfully procured and thus the loss wholly or partially remedied. A new note or bill might be substituted for the one lost; yet it would not be the same note or bill. It is not more than in other cases the loss of mere evidence or proof of property, but of property itself having intrinsic and appreciable value. If, on proof of loss, the amount of the bill or note should subsequently be recovered of the party liable to pay, the pursuit of this remedy should be imposed on the carrier and not on the owner. *Prima facie* the loss of the bills should be treated as a loss of the debt they represent. The payment of the loss by the carrier would transfer the title to him, and the burthen and risk

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of its subsequent recovery should devolve on him. (See 1 Park on Insurance, chap. 7, § 2, page 293; Abbott on Shipping, 502, part 4, chap. 10, sub. 12; *Brown v. Stapleton*, 4 Bing. 119.)

It is said that choses in action, bonds, bills, notes, mortgages, deeds, evidences of debt, and of title are exempt from contribution, and therefore that bank bills should be. I do not understand that in cases similarly circumstanced to the present they would be so exempt. They are ordinarily exempt because accessory to the person, but not so in any instance when they pay freight and become part of the cargo proper.

It is said that subjecting bank bills to liability is the introduction of a new principle, and would be disastrous if practically carried out, because if liable to contribute when saved, they are equally entitled to contribution if lost, and that the large sums and extraordinary values thus brought into the account for contribution would absorb the price of less valuable property, and therefore dictate the rejection of the principle. This consideration cannot be indulged. In the first place, jettison of articles of such light weight and such great value, is not permitted except in cases of emergency, and therefore they are much more likely to suffer than to exact contribution. In the next place there is no practical injustice in allowing and enforcing contribution according to a just valuation; and in the third place the question does not here arise *to what extent* these bank bills shall be made to contribute; for the plaintiffs refused to recognize the lien altogether, and therefore the defendant was warranted in refusing to surrender the property if the lien existed to the slightest amount. It was a question of lien or no lien, and not of amount of lien.

In my opinion the bank bills were bound to contribute to the loss. The bills were justifiably detained to respond for such loss; and the judgment should be affirmed, with costs.

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INGRAHAM, J., concurred in above opinions, as to all except that bank bills are property, under the law relating to contribution and average. Upon that point he was for reversal.

All the other judges being for affirmance, judgment affirmed.

Abstract of case.

MARGARET KNIFFEN v. ALFRED McCONNELL.

Where it was proved, in an action to recover damages for a breach of promise of marriage, that the uncle and aunt of the plaintiff, in her presence, and without objection on her part, asked the defendant to marry her, which he refused, and when the plaintiff said to the defendant: "M., I don't want your money; I want your word and honor that you promised me," he replied: "There is no use in talking; I can't marry you now." *Held*, that there was evidence enough, on the subject of a request, to submit that question to the jury.

In an action for breach of promise of marriage, evidence as to the defendant's pecuniary circumstances should be confined to general reputation. To that extent it is admissible.

Where the answer, in such an action, contains only a denial of the promise, evidence showing acts of improper and lewd conduct on the part of the plaintiff, for the purpose of proving criminal intercourse with other men, after the making of the promise, is not admissible, as a bar to the action, for the reason that that defense is not set up in the answer.

Such evidence may be received, however, in mitigation of damages, it seems.

It is not erroneous for the judge to charge the jury that if they find the defendant seduced the plaintiff under a promise of marriage it aggravates the damages.

Where the plaintiff proved: 1st. The promise, as admitted by the defendant in his acts and conversation. 2d. The pregnancy of the plaintiff, and subsequent birth of a child. 3d. The application to the defendant to marry her, on account of her condition, and his refusal. 4th. The appeal of the plaintiff to him that she did not want his money, but wanted his word and honor that he had promised her. *Held*, that this evidence was amply sufficient to submit to the jury the question whether the defendant had seduced the plaintiff, and if so, whether he had promised marriage, to carry out his intentions, or had taken advantage of the confidence arising from that promise to effect his purpose.

It is not erroneous to charge that if the defendant has come into court and attempted to prove the plaintiff guilty of misconduct with other men, of which he knew she was innocent, or when the misconduct was committed with himself, it aggravates the injury and strengthens the claim to damages, although such misconduct is not set up in the answer as a defense.

Where the judge charged that if the jury were satisfied that the defendant was not the father of the plaintiff's child, they should find for the defendant; *Held*, that there was some ground for criticism on this part of the charge; that the pregnancy being a conceded fact, it was not for the defendant to prove that he was not the father, but for the plaintiff to prove that he was.

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THIS was an action to recover damages for breach of a promise of marriage. The complaint contained a promise of marriage, made by the defendant to the plaintiff, to marry her when he should be thereafter requested; averring a request to marry and the defendant's refusal. It also contained a second allegation on a promise to marry the plaintiff within a reasonable time, a request by the plaintiff and a refusal to marry her, although a reasonable time had elapsed. The answer was a general denial of everything in the complaint.

Upon the trial, it appeared the defendant commenced paying attentions to the plaintiff in 1852, and continued his attentions till Sept., 1855. During that time, he went with the plaintiff to parties, balls and elsewhere; would spend his evenings with her, ride out on Sundays, and on his return stay till midnight. On one occasion, when the plaintiff was sick, the defendant visited her two or three times a week, and would fan her, staying from half an hour to two or three hours. On one occasion, when visiting her, he was told by a relative of the plaintiff they were old enough to get married, or to break up keeping company. To which he replied, he was not fooling about the matter. In April, 1855, on a visit he made to the plaintiff, the defendant was charged by her aunt with causing her condition—she being then pregnant—and asked what he was going to do about the matter. He denied being the father of the child. The plaintiff said no other man had ever had any connection with her. He was asked to marry her. He replied, he was not in a condition to marry then. He afterwards said she had proved herself to be treacherous, and he could not marry her. The plaintiff was about twenty-six years of age and the defendant forty. It was proved she had invited other young men in her room, and had gone to parties with them. Other evidence was given as to their riding together; and a sister of the plaintiff proved that the defendant told her they were engaged.

Upon the trial, the judge permitted the plaintiff to prove

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what the defendant was worth. This was objected to by the defendant, and the objection overruled upon the ground that the evidence was admissible to show the extent of the damage the plaintiff had sustained by the defendant's refusal to marry her. To this the defendant excepted.

When the plaintiff rested, the defendant's counsel moved for a dismissal of the complaint on the ground that there was no evidence of a sufficient request to marry on the part of the plaintiff. The motion was denied, and the defendant excepted.

The defendant offered to prove that the plaintiff was on one occasion in a private bedroom with some young men and they shut themselves in and remained for some time; and also acts of a lascivious character, showing that she had prostituted her person to others, after the alleged promise of marriage. This was excluded, on the ground that no such defence was set up in the answer; to which the defendant excepted. The same evidence was afterwards offered and admitted in mitigation of damages. It was proved that in September 1855, the plaintiff spent the night at a tavern with a young man other than the defendant, and that they lodged together; and a similar occurrence in July or August, 1854. Some evidence was given to impeach the testimony of these witnesses.

The judge, among other things, charged the jury that if they found the defendant had seduced the plaintiff under a promise of marriage, it aggravated the injury, and they might regard such seduction as an aggravation of damages. That if the defendant had attempted to prove her guilty of misconduct with other men of which he knew she was not guilty, or when the misconduct was committed by himself, it aggravated the damages.

The defendant's counsel asked the judge to charge that unless the jury were fully satisfied that there was a contract of marriage between the parties at the time the defendant was requested to marry the plaintiff, and that the defendant was the father of the child with which she was

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pregnant, the jury must find for the defendant. This was refused, but the judge did instruct the jury that if they were satisfied the defendant was not the father of the plaintiff's child, or that the defendant had any reasonable ground so to believe at the time of his refusal to marry her, then they should find for the defendant.

To these various points of the charge, and to the refusal to charge, the defendant duly excepted. The jury found a verdict in favor of the plaintiff for the sum of \$2,350, and the plaintiff remitted to the defendant the sum of \$350, and prayed judgment for the residue of the verdict and damages, being the sum of \$2,000 demanded in the complaint; and for the latter sum, with costs, judgment was entered. The general term affirmed an order of the special term denying a motion for a new trial, and judgment was entered on the verdict, for the plaintiff.

D. J. Sunderlin, for the defendant.

F. Kernan, for the plaintiff.

INGRAHAM, J. There was sufficient evidence of a request on the part of the plaintiff to marry, to warrant the denial of the motion to dismiss the complaint. The uncle and aunt, in her presence, and without objection on her part, asked the defendant to marry her on account of her condition, which he refused; and when the plaintiff said to him, "McConnell I don't want your money; I want your word and honor that you promised me," he replied, "There is no use in talking, I can't marry you now," there was evidence enough on the subject of a request to submit that question to the jury.

The defendant objected to evidence as to his pecuniary circumstances. The ground upon which this was admitted, was to show the full extent of the loss or damage the plaintiff had sustained by reason of the defendant's refusing to fulfill his engagement. By this, I suppose, it was

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intended to show that from the plaintiff's pecuniary condition, she would have been in the enjoyment of comfortable circumstances, and placed in the use of means, which by his refusal, she has been deprived of. It is now settled that in action for breach of contract, evidence of the condition of the defendant as to means is not admissible. And in other actions, a similar ruling has been adopted when the evidence was offered to increase the damages. Thus in *Myers v. Malcom* (6 Hill, 292), this evidence was held improper in an action for damages, from an explosion of gunpowder improperly stored. And in *Dain v. Wycoff* (3 Selden, 191), GARDINER, J. in an action for damages for seduction, says: "If the defendant can not show his poverty in mitigation of damages, there is no reason why the plaintiff should aggravate them by proof of his wealth." In *James v. Biddington* (6 Car. and P. 589), such evidence was held inadmissible in actions for criminal conversation. But in the latter case it is said this rule does not apply in action for breach of promise of marriage, where the amount of the defendant's property is material as going to show what should have been the station of the plaintiff in society if the promise had not been broken. (Sedg. on Dam. p. 544.) His means might have relieved her from labor, or placed her in a condition of comfort and independence which she would not have otherwise enjoyed. The objection in this case was not to the mode of proof, but to the admissibility of that kind of evidence. It may be objectionable to particularize the defendant's property, and such evidence should be confined to general reputation as to the circumstances of the defendant. To that extent I think it admissible.

The defendant offered evidence showing acts of improper and lewd conduct on the part of the plaintiff, for the purpose of proving criminal intercourse with other men. This was excluded by the court, for the reason that the same was not set up in the answer. There was no error in this ruling. The alleged improprieties had taken place after

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the promise of marriage had been made. They did not show the contract to be void from its commencement, but they showed acts which relieved the defendant from an obligation of performance, and which constituted a defense to the original cause of action. The code, section 149, requires an answer to contain either, 1. Denials of the plaintiff's allegations; or, 2. A statement of any new matter constituting a defense or counter-claim. The wording of this section is imperative. The answer *must contain* such statements. In this case the answer only contained a denial of the promise. It gave no information of any new defense, or any new matter occurring after the contract, that formed a defense. No issue was formed as to such a defense. In *McKyring v. Bull* (16 N. Y. 297), the effect of this section was held to be such as to require all matter, if it constituted a defense, to be pleaded. (See also *Wright v. Delafield*, 25 N. Y. R. 270.) While, however, this was not admissible as a bar to the action, the defendant offered and the court received it in mitigation of damages, and the defendant received the full benefit of it, as much as he would have done if received on the first offer. In addition to the admission, the judge gave the defendant the full benefit of the evidence as a defense when he told the jury if the defendant was not the father of the plaintiff's child, or had any reasonable ground so to believe at the time of his refusal to marry her, they should find for the defendant.

The judge also charged that if they found the defendant had seduced the plaintiff, under a promise of marriage, it aggravated the damages. I do not understand the objection to this ruling to be to its correctness as a rule of law, but that it was not warranted by the evidence, and that the judge submitted to the jury a proposition not sustained by the evidence, and not in the case. The propriety of the rule was fully examined by MASON, J., in *Wells v. Padgett* (8 Barb. 323), and cases cited by him from Massachusetts, Mississippi, Tennessee, Kentucky and Indiana, approving that rule. The only case cited to the contrary is from

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Pennsylvania, but the propriety of that decision has been since questioned. The weight of authority and the general principles upon which such evidence has been admitted, are strongly in favor of sustaining the rule.

Was there then evidence enough in the case to warrant the finding of the jury on that point. There was proved: 1st. The promise as admitted by the defendant in his acts and conversation. 2d. The pregnancy of the plaintiff, and subsequent birth of the child. 3d. The application to him to marry the plaintiff, on account of her condition, and his refusal. 4th. The appeal of the plaintiff to him that she did not want his money, but wanted his word and honor that he had promised her. These and other portions of evidence bearing upon this question were amply sufficient to submit to the jury the question whether he had seduced the girl, and if so, whether he had promised marriage to carry out his intentions, or had taken advantage of the confidence arising from that promise to effect that purpose. There is no room for the objection that there was not enough evidence on which that question could be submitted to the jury.

The judge also charged that "if the defendant had come into court and attempted to prove her guilty of misconduct with other men, of which he knew she was not guilty, or when the misconduct was committed with himself, it aggravates the injury and aggravates the claim to damages." In *Southard v. Rexford* (6 Cowen, 254), it was held that an attempt to justify the breach of promise of marriage by stating upon the record, as the cause of desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, is a circumstance which ought to aggravate damages. The reason given by the learned judge in that case is that a verdict for nominal damages under such circumstances would be fatal to the plaintiff. The rule is undoubtedly founded upon the fact that the justification is placed upon the record, and that it will ever remain there

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as a reiteration of the charge against the plaintiff, and with such an answer on the record, a trifling verdict would not show that such charge was unfounded. The same rule applies to actions for libel and slander; but I have not seen any case where the rule has been extended beyond a justification upon the record. The defendant certainly did prove improprieties on the part of the plaintiff, after the promise was made, not perhaps as to the prostitution, for those witnesses were discredited, to some extent, and may have been disbelieved by the jury. The attempt to submit such conduct to the jury, when the same is not made a part of the record, does not in my judgment warrant the charge of the judge in the present case. Such a rule would deprive a party of a right to submit any thing in mitigation of damages, as connected with the plaintiff's conduct, without assuming the liability of having the damages increased if he fails in establishing the truth of them.

It is an anomaly in an action for a breach of contract, to hold that setting up matters to excuse such breach, in an answer, the proof of which fails, is an aggravation of damages. Certainly the rule should be extended no further than the case of *Southard v. Rexford* has carried it; and where it is not made a part of the record and set up by way of justification, there is no good reason for the rule as laid down upon the trial. It has been held that to prove the bad character of the plaintiff in such an action, the representations of character made by third persons may be given in evidence without proving their truth. (*Foulkes v. Solway*, 3 Esp. Rep. 236.) If the rule, as laid down at the circuit, be correct, then such proof would only be an aggravation of the damages. I think there was error in this part of the charge, and that the rule should have been confined to the justification set up on the record.

There is also some ground for criticism in the remaining part of the charge objected to by the defendant, viz: That if the jury were satisfied that the defendant was not the father of the child they should find for the defendant.

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The pregnancy was a conceded fact. It was not for the defendant to prove that he was not the father, but for the plaintiff to prove that he was, if she wished to relieve herself from the effect of the admitted pregnancy. The instruction to the jury might very easily lead them to suppose that unless it was proved the defendant was not the father, they might suppose him to be the father, and punish him accordingly.

For the cause above stated as to the charge that the attempt to prove facts imputing want of chastity to the plaintiff, which failed, was an aggravation, I think a new trial should be ordered; but a majority of the court are of the opinion that the charge was not erroneous in this respect, and that attempting to give such matters in evidence, though not set up in the answer as a defense, if not made out, warrants the charge to the jury that it should aggravate the damages.

The judgment, therefore, must be affirmed.

MULLIN, J., concurred with INGRAHAM, J., upon the last point. All the other judges being for affirmance, judgment affirmed.

Statement of case.

**ROBERT DODGE, Executor, &c., v. CALVIN L. CRANDALL
and others.**

Where the holder of a mortgage which was past due, being about to enforce it by action, H. agreed by parol with the plaintiff's testator, who had assumed the payment thereof, for a valuable consideration, to purchase said mortgage and refrain from collecting the principal for five years. *Held*, that this agreement, being executed by the taking of an assignment of the mortgage, and the payment of the consideration therefor, operated as effectually to extend the time of payment, as if it had been under seal. *Held, also*, that this was an executory and not an executed contract, and was, therefore, not affected by the statute of frauds.

Held, further, that a judgment dismissing the complaint, in an action to foreclose the mortgage, brought before the expiration of the five years, was sustainable upon the equitable ground that the defendant, having a cause of action, could be allowed to set it up to avoid circuity of action.

A judgment, in an action brought by an executor, as such, dismissing the complaint with costs, and adjudging that the defendants recover of the plaintiff a specified sum, for their costs and disbursements, without any direction that the plaintiff shall pay the costs personally, can only be collected from the assets in his hands. It is in law a judgment against him for costs as executor, and is properly rendered as though he was prosecuting in his own right.

Appeal from a judgment of the Supreme Court.

THIS action was to foreclose a mortgage executed by Crandall and wife to David Barclay, on 9th February, 1853, to secure the payment of the sum of \$800, in three instalments of \$266.66 each; the first instalment to be paid on 1st March, 1855; the second on the 1st March, 1856; and the third on 1st March, 1858; interest to be paid annually on 1st March in each year, on the whole principal remaining due and unpaid. On the 29th April, 1854, Barclay assigned the mortgage to Jerusha Holcomb and Jerusha Barclay, who, on the 6th June, 1854, assigned it to Lyman D. Nield. On the 28th March, 1855, Nield assigned it to S. V. R. Mallory. Mallory died on 19th September, 1856, and on the 29th of that month letters of administration were granted on his estate to Thomas M. Howell. On 28th

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February, 1859, Howell, as such administrator, in consideration of the sum of \$576.56, to him paid by John W. Holberton, the plaintiff's testator, assigned the mortgage and the bond accompanying the same to Holberton. Holberton died in February, 1862; and in June, 1862, these foreclosure proceedings were commenced by his executor.

Prior to the 23d February, 1856, the defendant, Frederick C. Holcomb, had purchased of Crandall, the mortgagor, and became the owner of the mortgaged premises, and had agreed with Crandall to assume and pay the bond and mortgage to the owner and holder thereof, and was under obligations to pay the same at the time of the assignment to Holberton. Shortly previous to the 28th February, 1859 (the date of the assignment of the bond and mortgage by Howell as administrator of Mallory to Holberton, the plaintiff's testator), it was agreed between Holberton and the defendant Holcomb, that Holberton should buy of Howell, administrator as aforesaid, the said bond and mortgage, and take an assignment thereof, and hold the same for the term of five years, from the 28th Feb., 1859, and give Holcomb the said term of five years within which to pay said bond and mortgage, and should not collect the same until that period of time should elapse; and that Holcomb should pay Holberton for so buying and holding said bond and mortgage, and giving day of payment thereof as aforesaid, the sum of fifty dollars. That in pursuance of such agreement, Holberton took an assignment of such bond and mortgage as before stated, and agreed to give the said Holcomb five years from 28th February, 1859, to pay the same. And Holcomb thereupon, in consideration thereof, paid the said John W. Holberton the said sum of fifty dollars. The time for which the payment of the bond and mortgage was so extended by said agreement had not, when the suit was commenced, or at the time of the trial, elapsed, and would not expire until the 28th February, 1864.

Holcomb, amongst others, was made a party defendant in

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the foreclosure suit, and answered setting up the agreement between himself and the plaintiff's testator to purchase the bond and mortgage of the administrator of Mallory, and give and extend the time of payment thereof to him for the period of five years from the 28th February, 1859.

The cause was tried by a referee. The plaintiff's counsel admitted that there had been no default in the payment of interest upon the bond and mortgage, and that he did not claim a right to foreclose the mortgage by reason of any default of payment of principal; he claimed the right to foreclose it, and maintain the action for that reason, unless it was established that there had been a good and legal agreement, extending the time of the payment of the principal. It was also conceded and admitted by the plaintiff's counsel, that Frederick C. Holcomb, the defendant, was the owner in fee of the mortgaged premises, having purchased the same, subject to the mortgage in question, and having become bound to pay the bond and mortgage as part of the purchase money for the same, prior to the purchase of said bond and mortgage by John W. Holberton, deceased, and that he, Holcomb, was in a proper condition to avail himself of any defense in this action, including the defense set up in the answer, provided that such an agreement was made.

The defendant's counsel then offered to prove the defense set up in the answer. The counsel for the plaintiff objected to Holcomb proving a parol agreement between himself and the plaintiff's testator, to extend the time for the payment of the principal due upon the bond and mortgage for five years on the payment of fifty dollars, as set up in the answer of the defendant, on the ground that such agreement not being in writing, was void and contrary to the statute of frauds. The referee overruled the objection, and the plaintiff's counsel excepted.

The referee heard the evidence, and found the facts as above set forth; and found as a conclusion of law that

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said agreement extending the time of payment of the bond and mortgage for five years from the 28th February, 1859, although by parol, was valid and effectual. That, therefore, there was nothing due the plaintiff on such bond and mortgage, and he could not sustain the action, and that his complaint must be dismissed. He ordered judgment accordingly. The plaintiff's counsel excepted to the referee's conclusions of fact and of law in respect to the agreement to purchase, enlarging the time of payment of the bond and mortgage.

Judgment was entered on the report of the referee dismissing the complaint "with costs," and adjudging that the defendants "recover of Robert Dodge, the plaintiff, the sum of \$96.21, their costs and disbursements." The plaintiff appealed to the general term, when the same was affirmed. The plaintiff then appealed to this court.

C. Tracy, for the appellant.

I. The judgments entered are irregular and unauthorized. This action is solely by an executor. The judgment is made personal for costs without an order of court therefor. The referee has no power to award costs. (*Woodruff, Adm'r, v. Cook*, 14 How. 481; Code, § 317; *Mersereau v. Ryers's Adm'r*, 12 How. 301.)

II. The verbal agreement alleged as a defense whereby the payment was extended for five years, of a specialty made between strangers prior to any interest acquired therein by the party sought to be charged, is void by the statute of frauds. (2 R. S. 135, § 2, sub. 1.) It was an executory and not an executed agreement. (Story on Contracts, § 18-20; Bouvier's Dict. "Agreement," and "Executed.") The admission of matter as a defense to avoid circuity of action is allowed only where such matter is a good cause of action. (4 Wend. 360; 3 Cow. 151.) "It is an agreement that by its terms is not to be performed within one year from the making thereof." (*Vide* cases cited, 2 Abb.

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Dig., pages 84 and 85.) It is not an agreement to make a valid new mortgage or written or sealed extension or valid release, or one which equity would decree performed, but it is set up and found as simply a completed verbal understanding to wait five years for the debt then past due by its terms, on which the debtor has no remedy. (*Stoddard v. Hart*, 23 N. Y. R. 556; *Marshall v. Lynn*, 6 Meeson & Welsby, 109.) It is expressly not to be completed till five years had elapsed, and it cannot be upheld by cases where performance might be within a year, or of part performance within the year, nor for "rescission" or as "executed." (*Delacroix v. Bulkley*, 13 Wend. 71; *Lockwood v. Barnes*, and notes, 3 Hill, 128; 6 Seld. 232.) The verbal contract alleged, and so found by referee, is entire, viz.: to purchase the bond and mortgage and not to enforce its payment in five years. Although in part executed, it is void by the statute, for the extension, and therefore wholly void. (*Van Alstyne v. Wimple*, 5 Cowen, 162; 8 Johns. 253; *Baldwin v. Palmer*, 6 Seld. 232.) On such a "void" and "null" contract no action lies, and no defense exists. (*Kellogg v. Olmsted*, 25 N. Y. Rep. 189; 23 N. Y. Rep. 556; *Hunt v. Bloomer*, 5 Duer, 202, Aff'd, 3 Kern. R. 341; *Baldwin v. Palmer*, 6 Seld. [10 N. Y.] 232; *Halsted v. Spencer*, How. Ap. Cas. 319; *Broadwell v. Getman*, 2 Den. 87; *Pitkin v. Long Island Railroad Company*, 2 Barb. Ch. 221; *Amburger v. Merwin*, 4 E. D. Smith, 393; *Burk v. Earl of Liverpool*, 9 Barn. & Cres. 392; *Bracegirdle v. Heald*, 1 Barn. & Ald. 722; *Peters v. Crompton*, 1 Smith's S. C. 145, note; *Lyon v. King*, 11 Met. 411; *Peters v. Inhabitants of Westboro*, 19 Pick. 354; *Foster v. McO'Blennes*, 18 Missouri, 88; *Pierce v. Estate of Paine*, 31 Vt. 34.) Such a defense should have been excluded. (5 Bosworth, 238, and cases cited; 31 Barb. 267; *St. Nicholas Insurance Co. v. Mer. Marine Insurance Co.*, 6 Duer, 208-19; *Townsend v. Emp. Stone Co.*) Such alleged agreement extending a specialty, whether with or without consideration, is expressly adjudged void. (*Allen v. Jaquish*, 21 Wend.

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628; *Eddy v. Graves*, 23 ib. 84; 4 Hill, 484; 31 Barb. 548; *Bander v. Snyder*, 5 Barb. R. 70); and immaterial; (*Hasbrouck v. Tappen*, 15 John. 200, 3 and 4.) The debtor may at any time thereafter have tendered the debt. In the principal opinion below the judgment is upheld solely "to avoid circuitry of action," although the agreement is conceded to be "void," upon which no action or defense could be maintained. (*Lathrop v. Hoyt*, 7 Barb. 60; 2 Story Eq. Jur. 611, §1201; 5 id. 70; 25 id. 440.) On a valid agreement any damage to the debtor from tender of his lawful debt or performance at any time, would be "fanciful." (25 N. Y. R. 189.) The cases cited as "analogous," viz., 1 Wend. 360, 3 Cow. 151, are upon sealed contracts modifying personal obligations. No cases of enlargement by parol of personal contracts, as by waiver of performance, or by not being expressly prohibited within one year, have any application to specialties, or any other contract which would not have been valid if made by parol. (*Blood v. Goodrich*, 9 Wend. 68; 6 Meeson & Welsby, 109; 13 Wend. 71.) There was no legal consideration. If the sum of fifty dollars was paid, it was paid for the forbearance, and was usurious (1 R. S. 772, §§ 1 and 2), and can not maintain such agreement, any more than if paid on account. (*Hunt v. Bloomer*, *supra*, cases cited; 2 Abb. Dig. 28.) This pretended agreement, so upheld below, by the principal debtor, Holcomb, discharges the mortgagor, Crandall, and the mortgage itself, and is alleged to have been made with a stranger before assignment. (*Trotter v. Hughes*, 2 Kernan, 74.) The evidence should have been excluded. The agreement is not made out by evidence.

III. The appellant's exceptions are well taken. (*Vilas v. Jones*, 1 Comst. 286-7; *La Farge v. Herter*, 9 N. Y. R. 241, 243; *Crain v. Hubbel*, 7 Paige 413; *Judd v. Seaver*, 8 id. 548.)

Argument for Respondents.

E. W. Gardner, jr., for the respondents.

I. On the trial before the referee, the only point made by the plaintiff's counsel was, that the agreement to extend the time of payment, or to forbear to foreclose for five years, was within the statute of frauds, declaring contracts not to be performed within a year, void unless in writing. But, at general term, this position was substantially abandoned by the appellant's counsel, and the main points made by him were: 1. That Holberton, not yet being the owner of the mortgage, could make no valid agreement in regard to it; and, 2. The mortgage being a specialty, no agreement in regard to it could be valid unless the agreement was also a specialty.

II. And presuming that the same points will be made here upon the argument, I will consider them in their order.

1. The statute applies to executory and not to executed contracts; and, by reference to the case, it will be seen that Mr. Holberton agreed in substance to purchase the bond and mortgage, and forbear to foreclose it for five years, in consideration of fifty dollars—which contract was fully executed at once. Mr. Holberton did purchase the bond and mortgage, and took an assignment of them, and Holcomb paid him the fifty dollars. Nothing further remained to be done by either party; Holberton had simply to wait the five years for his money. Holcomb had paid the consideration money, and Holberton had entered upon the contract by receiving the money and purchasing the mortgage, and neither party could rescind the contract. Holcomb could not recover back the money, and Holberton could not refuse to carry out the contract, based as it was upon a good consideration, and which he had undertaken to execute. (*Talmadge v. R. & S. R. R. Co.*, 13 Barb. 493; 2 Leighs' N. P. 1045; *McLees v. Hall & Bowen*, 10 Wend. 426; *Donellin v. Reed*, 3 Barn. & Adol. 899.)

III. But it is claimed by the appellant that Holberton, not being the owner of the mortgage, could make no valid

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agreement extending the time, prior to any assignment. There might have been some force in this position provided Holberton had never purchased the mortgage. This objection, however, has no force in this case, for Holberton did purchase the mortgage and take an assignment, and hold the mortgage at his death, and this action is by his representative; and upon his becoming the owner, the contract took effect as a valid contract, at least from the time he took the assignment.

IV. The position taken by the plaintiff, that he is a *bona fide* holder without notice, cannot be maintained, for, so far as his right to maintain this action is concerned, he takes the place of Holberton, and a person standing in that responsible position should have moral integrity enough to carry out his contracts. Holberton, when living, would sooner have lost his right arm than have attempted to avoid this contract; and, now he is dead, the court will see to it (at least if it is legal to do so), that his executor shall carry out the wishes and legal obligations of his testator, and not allow him, after a poor man has paid his money for more time to meet his obligations, to ruin him by this prosecution.

V. If I am right in this position, that this was an executed and not an executory contract, then the position of the plaintiff, that this contract should have been under seal, is answered; for, if the contract was executed, it operated at once to extend the time of payment five years from the time of taking the assignment, and the case does not come within the decisions requiring certain contracts to be under seal. And it is conceded that Holcomb is in a proper position to set up this contract, provided such an agreement was made. And it is also conceded that there is no default in the payment of the interest. It is also suggested here, that as title to this mortgage would pass by mere delivery without a written assignment, whether an agreement to extend the time of payment, if founded upon a good consideration, would not be valid and effectual for that purpose,

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even if executory and not reduced to writing. In other words, is it an agreement varying the terms of the contract, so as to require it to be under seal? or is it not rather an agreement, based upon a good and valid consideration, to hold the contract in abeyance until the expiration of the time fixed upon by the new contract. (*Lattimore v. Har- sen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Dela croix v. Bulkley*, 13 Wend. 71; *Fleming v. Gilbert*, 3 Johns. 528; 1 Barb. S. C. R. 327; 12 Barb. 366; *Clark v. Dales*, 20 Barb. 42; *Stone v. Sprague*, 20 Barb. 509.)

VI. But it seems clear, from the reasoning of his Honor, Judge SMITH, in the opinion at general term, that in any event the judgment could be sustained upon the equitable ground that the defendant, having a cause of action, would be allowed to set it up, to prevent circuity of action. That Holberton having taken the assignment, and held it under the contract as proved, and received a consideration therefor from the defendant, and this action being by his representative, it is precisely the same as if he was seeking to foreclose the mortgage by suit, notwithstanding such agree- ment; and if the defendant could have no defense to the foreclosure, still his agreement with Holberton would give him a right of action for the injury received; otherwise he would be remediless; and this being the case, the plaintiff would not be permitted to foreclose the mortgage, and the court, to prevent circuity of action, will give effect to this agreement as a defense to the suit; and upon this principle also the decision of the referee can be sustained. (*Brown v. Williams*, 4 Wend. 360; *Clark v. Bush*, 3 Cowen, 151; *Jackson v. Root*, 18 Johns. 60.) But, in either view of the case, we submit that the decision of the referee was right, and the judgment should be affirmed.

WRIGHT, J. The mortgage sought to be foreclosed by action, was in the winter of 1858-9, held by the adminis- trator of S. V. R. Mallory, deceased. The premises covered by it, had, after its execution, and about the 23d February,

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1856, been conveyed by the mortgagor to the defendant Holcomb, who assumed the payment of the mortgage as a part of the purchase price of the premises. The mortgagor had paid the interest, and \$266.66 of the principal sum secured by it, before the sale and transfer of the premises to Holcomb. Afterwards, Holcomb paid the interest. The whole principal became due and payable on the 1st March, 1858. Shortly before the 28th February, 1859, (the administrator of Mallory being about to foreclose the mortgage,) Holcomb entered into an agreement with the plaintiff's testator, whereby the latter agreed to purchase the mortgage of Mallory's administrator, who then held the same, and extend the time of payment five years; or give that additional time from the time he took the assignment, to pay the balance due upon the bond and mortgage; in consideration of which, Holcomb agreed to pay him fifty dollars, which he did pay, and Holberton took the assignment of the mortgage, and continued to hold the same, and receive payments of interest thereon up to his death. The bond and mortgage were assigned to the plaintiff's testator on 28th February, 1859, and the time agreed to be given to Holcomb to make payment would not expire until the 28th February, 1864.

This foreclosure suit was brought in June, 1862, and the question is whether the executor of Holberton is entitled to sustain it, notwithstanding the contract of his testator to purchase the mortgage, and forbear foreclosing it for five years; or, in other words, to extend the time of payment of the debt secured to be paid by it, and which was due, for five years from such purchase. If Holberton, in the face of his contract, was not entitled to maintain an action to collect the principal secured by the mortgage by a foreclosure thereof, before the five years elapsed, it is very clear his representative is not.

The ground taken at the trial was, that the contract was void by the statute of frauds, not being in writing, and being an agreement that by its terms was not to be per

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formed within one year from the making thereof. (2 R. S. 135, § 2, sub. 1.) I am of the opinion that it was not affected by the statute. The statute applies to executory, and not to executed contracts; and the one in question, I think, was of the latter description. It was certainly executed by Holcomb; and it seems to me the purchase of the mortgage by the plaintiff's testator was an execution on his part. Holberton, agreed in substance, to purchase the mortgage, and forbear to foreclose it for five years, in consideration of fifty dollars. He did purchase, and take an assignment of it, and Holcomb paid him the fifty dollars. Thus, the contract was fully executed. Nothing further remained to be done by either party. Holberton had simply to wait the five years for his money. Holcomb had paid the consideration money, and Holberton had entered upon the contract by receiving the money and purchasing the mortgage, and neither party could rescind it. Neither could Holcomb recover back the money, nor Holberton refuse to carry out the contract, based as it was upon a good consideration, and which he had undertaken to execute.

The further point is now urged (although not alluded to on the trial), that the mortgage being a specialty, no agreement in regard to it could be valid unless the agreement was also a specialty. It may be conceded that ordinarily a sealed executory contract can not be rescinded or modified by a parol executory contract; but that was not this case. Here the mortgage was due. The holder was about to enforce it by action; whereupon Holberton agrees, for a valuable consideration, to purchase and refrain from collecting it for five years. This agreement is executed by the purchase; and as respected the plaintiff's testator, operated as effectually to extend the time of payment as if it had been under seal. Indeed, as title to the mortgage would pass by mere delivery without a written assignment, I cannot see why an agreement to extend the time of payment, if founded upon a good consideration, would not

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be valid and effectual for that purpose, even if executory, and not reduced to writing. The agreement, in this case, was not one varying the terms of the sealed contract so as to require it to be under seal, but rather an agreement, based upon a good and valid consideration, to hold such contract in abeyance until the expiration of the time fixed upon by the new contract. It was conceded upon the trial that Holcomb was in a proper position to set up the new contract, provided such an one was made.

But, in any event, as suggested by the learned judge delivering the opinion in the supreme court, the judgment is sustainable upon the equitable ground that the defendant having a cause of action, would be allowed to set it up to prevent circuity of action. Holberton having taken the assignment, and held it under the contract as proved, and received a consideration therefor from the defendant, and this action being by his representative, it is the same as if he were seeking to foreclose the mortgage by suit, notwithstanding his agreement. If the defendant could have no defense to the foreclosure, still his agreement with Holberton would give him a right of action for the injury he received; otherwise he would be remediless. In the face of his agreement, Holberton, or his representative, ought not to be allowed to foreclose the mortgage; and on the principle of avoiding circuity of action, the law will give effect to such agreement as a defense to the foreclosure suit.

The judgment of the supreme court should be affirmed.

JOHNSON, J. The agreement between the defendant Holcomb and the plaintiff's testator, was that the former should pay to the latter fifty dollars, and that the latter in consideration thereof, should purchase the bond and mortgage in question, and extend the day of payment of the principal for the period of five years, from the time of the making of said agreement. Holcomb thereupon, paid the money, and the testator purchased and took an assignment

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of the bond and mortgage. The mortgage debt was then wholly due, and the testator's assignor was about proceeding to foreclose the mortgage. The principal, if not the only question in the case, is whether this being by parol, was a valid agreement, and operated to extend the time of payment of the indebtedness. If it was, and such was its effect, the action was prematurely brought, and the decision of the supreme court was right, whether the proper reason for the judgment was assigned or not.

That the time of the payment of a simple contract debt may be thus extended, so that no action will lie for its recovery until the expiration of the extended time, when the agreement to extend is founded on a good consideration, is too well settled to admit of question. Under the former system of practice, such an agreement, to defeat the action, could be proved under the general issue, as it went to show that nothing was due, and there was no cause of action when the suit was commenced. (1 Chit. Pl. 512.) And so, I suppose, under the present system, the same evidence may be given under a general denial, as it goes to controvert what the plaintiff is bound to establish by his evidence, to wit: the existence of a demand due at the commencement of the action. In such a case the subsequent agreement operates upon the instrument, where the demand is evidenced by writing, and becomes part of it, so that the obligation, instead of becoming due according to its terms, is only due at the expiration of the extended time, and until that happens, no action can be maintained upon the instrument. The subsequent agreement does not operate to destroy the original agreement, but only to modify it in respect to the time of payment.

It is claimed, however, on the part of the plaintiff, that this principle has no application to instruments under seal, and that in regard to instruments of that character, it requires an agreement in writing of equal solemnity to effect a change or modification in any material particular. This seems to be the rule in such cases, before any breach

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of the specialty, and where the subsequent agreement is executory merely. It was so held in *Allen v. Jaquish* (21 Wend. 628), and in *Eddy v. Graves* (23 id. 84), cited in the opinion of the court in this case at general term.

But it is, I think, equally well settled that after the breach of a sealed agreement it may be modified in any respect, or wholly rescinded, by an executed parol agreement founded upon a sufficient consideration. (*Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Fleming v. Gilbert*, 3 Johns. 528; *Keating v. Price*, 1 Johns. Cas. 22; *Delacroix v. Bulkley*, 13 Wend. 71; *Townsend v. Empire Stone-dressing Co.*, 6 Duer, 208.) Many other cases might be cited to the same effect, but the rule seems to be too well settled to require it.

That this was an executed and not a mere executory contract between the parties is extremely clear. The defendant's proposition was to pay \$50, in consideration that the plaintiff's testator would buy the bond and mortgage and extend the time of payment. This proposition was accepted by the testator who received the money and made the purchase. Nothing else was to be done. The agreement did not contemplate the doing of any further or other act, to effect the extension. The extension was effected completely and perfectly in law the moment the agreement was consummated by the payment of the consideration on one side and the purchase of the securities on the other. The agreement was then completely executed, and took effect upon the bond and mortgage which, in the hands of the assignee, became due and payable as against the defendant Holcomb in five years, and not before. After that it was in no conceivable sense an executory agreement. Its entire object and purpose had been completely and perfectly fulfilled. It is upon this principle only that the proof of an agreement to extend the time defeats the action brought before the expiration of the extended time. The defense in such case does not proceed upon the ground of recoupment of damages for a breach of the agreement to

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extend, but upon the ground that the agreement, by its own force, operates upon the original contract, and effects the extension by way of a modification of the contract. The statute of frauds has, clearly, nothing to do with the case.

The objection that the judgment is made personal for the costs is not reviewable on this appeal. But if it were it is not well taken. The code (§ 317) provides that in an action prosecuted or defended by an executor, administrator or trustee of an express trust, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon, or collected of, the fund or party represented, unless the court shall direct the same to be paid by the defendant or plaintiff personally, for mismanagement or bad faith in such action or defense.

There is no direction in the judgment that the plaintiff shall pay the costs personally; and it can only be collected from the assets in his hands. It is in law a judgment against him for costs as executor, and is properly rendered as though he was prosecuting in his own right.

The judgment should, therefore, be affirmed.

All the judges were for affirmance, except SELDEN, J., who thought the agreement void under the statute of frauds, as not to be performed within a year. Judgment affirmed.

Statement of case.

PLATT ADAMS v. SIMEON LELAND, and others.

When a promissory note is not made payable at any particular place, generally, in order to charge the endorser, payment must be demanded of the maker, at his place of residence or business. Yet there are various exceptions to this rule.

If the maker has no known residence or place, the holder will be excused from making any demand whatever. So, if in the intermediate period between the time when the note was made, and when it becomes due, the maker has removed his domicile or place of business to another state, the holder will be excused for non-presentment for payment, and will be entitled to the same recourse against the endorsers as if there had been a due presentment.

It will, in such a case, be sufficient to present the note at the maker's former residence or place of business.

Where the makers had, since the making of the note, removed their place of business, unknown to the holder, and on inquiry at the former place of business, the holder was referred to the agent of the makers, who informed him that they were "out west:" *Held*, that this was equivalent to saying they were out of the state; and that due diligence had been used by the holder to ascertain where to demand payment.

Appeal from a Judgment of the Superior Court of the City of New York.

THE defendants were sued as endorsers of a promissory note as follows:

"\$6,000.

"NEW YORK, February 12, 1857.

"On the 20th June next, without grace, we promise, to pay to James Moore, or order, six thousand dollars, for valued received, with interest, at the rate of seven per cent. per annum; having deposited with J. Thompson, as collateral security, with authority to sell the same at the broker's board, or at public or private sale, or otherwise, at his option, on the non-performance of this promise, and without notice, nine thousand five hundred dollars, bonds of the Sciota and Hocking Valley Railroad Company.

"SEYMOUR, MOORE & Co."

The making of the note by the firm of Seymour, Moore & Co., and the endorsement thereof by the defendants,

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was proved. At its maturity, it was held by John Thompson, and in August, 1857, was duly assigned to the plaintiff.

The only question in the case was, whether payment of the note was properly demanded of the makers.

The proof showed that at the date of the note, the place of business of the firm of Seymour, Moore & Co., the makers, was at No. 110 Broadway, New York, over the Metropolitan Bank. They had an office there. When the note became due, it was given by Thompson, the holder, to a notary to protest. The notary called at 110 Broadway, and found the name of "Seymour, Morton & Co." over the door, and understood from a man in the office that they were the successors of the firm of Seymour, Moore & Co. He demanded payment thereon, which was refused. The person in attendance told him that that had been the office of Seymour, Moore & Co., and referred him to a Mr. Lincoln, No. 54 William street. He declined paying the note, saying he had no money. The notary went to No. 54 William street; saw Lincoln; told him he understood he was the agent of Seymour, Moore & Co.; he said he knew nothing about the note, and refused to pay it. The notary inquired of him if he knew where they were. He said he supposed they were out west. He professed to know, but declined to give the notary much information about the firm.

At the close of the case, the defendants' counsel moved to dismiss the complaint, on the ground that the plaintiff had failed to prove a demand on the makers at the maturity of the note. Which motion was denied, and the defendants excepted.

The plaintiff had a verdict; and judgment being entered, on appeal to the general term, the same was affirmed. The defendants bring this appeal; no counsel appears for them.

E. Moore, for the respondent.

WRIGHT, J. I am of the opinion that the non-suit was properly denied. The note was dated at New York, and

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the place of business of the makers when it was given, was at No. 110 Broadway. It seems that when payable (and unknown to the holder), the firm of Seymour, Moore & Co. (the makers), had been dissolved, and a new firm (Seymour, Morton & Co.), had succeeded them in business at the same place. There was a person in attendance in the office from whom the notary demanded payment, but who refused to pay, saying he had no money, and referred him to a Mr. Lincoln, an agent of the makers, at No. 54 William street. The notary went to No. 54 William street, and saw Lincoln, who did not dispute his agency or connection with the makers, but knew nothing about the note, and refused to pay it. Upon being inquired of, if he knew where the makers were, he said he supposed they were "out west."

When a promissory note is not made payable at any particular place, generally, in order to charge the endorser, payment must be demanded of the maker at his place of residence or business. Yet there are various exceptions to this rule. If the maker has no known residence or place, the holder will be excused from making any demand whatever. So, if in the intermediate period between the time when the note was made and when it becomes due, the maker has removed his domicile or place of business to another state, the holder will be excused for non-presentment for payment, and will be entitled to the same recourse against the endorsers, as if there had been a due presentment. It will in such case, be sufficient to present the note at his former residence or place of business. (*McGruder v. The Bank of Washington*, 9 Wheaton, 598; *Taylor v. Snyder*, 3 Denio, 145.)

In this case, the residence of the makers, when this note was made, was in the city of New York, and their place of business at No. 110 Broadway. The note was presented for payment there. It was found that they had removed, and been succeeded in business by another firm. The notary was referred by their successors to a Mr. Lincoln,

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their agent, for information as to the note and the whereabouts of the makers. Lincoln did not dispute his agency, or connection with them, but knew nothing about the note. He said he supposed they were "out west." The common understanding of the phrase is, "in the Western states," it means out of this state.

Not finding the makers of the note, or any one of them, at No. 110 Broadway, the place of business of the firm when the note was made, the question is whether due diligence was used to ascertain where to demand. The makers had removed their place of business, unknown to the holder of the paper; and, on inquiry of their agent, the notary was informed by him they were "out west." This was equivalent to saying that they were out of the state. This, I think, was sufficient. (*Foster v. Julien*, 24 N. Y. R. 28.) When the maker of a note has removed into another state, subsequent to the making of the note, the holder need not follow him to make a demand; but it is sufficient to present the note at his former place of residence or business. Indeed, in such case, the holder is excused from making a demand. The judgment should be affirmed.

All the judges concurred, except INGRAHAM, J., who read an opinion in favor of reversal.

Judgment affirmed.

Statement of case.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE MAHAIWE
BANK v. JOSHUA CULVER.

The defendant J. C., covenanted, upon the plaintiff's agreeing to give an extension of credit to B. C., on his executing a mortgage for \$4,000, that "if the title of the said B. C. is good (which said J. does not warrant), the same (i. e., the farm) shall bring on foreclosure sufficient, after payment of" certain prior mortgages, "to satisfy the said mortgage" to the plaintiff, &c. *Held*, this was an absolute covenant that on a foreclosure the premises should bring enough to pay the plaintiff's mortgage "if the title of B. C. is good."

And that the covenant meant what is literally expressed, viz: that the farm should bring enough, on foreclosure, to pay the plaintiff's mortgage, if the mortgagor's title was good, i. e., not in fact legally defective.

And it being neither averred nor proved that B. C.'s title to the premises mortgaged to the plaintiff was defective within the intent and meaning of the defendant's covenant, *it was held* that the existence of an adverse claim to the farm, and the pendency of a suit respecting it, at the time of foreclosing a prior mortgage, did not establish a defect in the title, or constitute any defense to an action on the covenant.

ONE Backus Culver was indebted to the plaintiff, upon notes discounted by the bank, to the amount of \$4,000. He applied to the bank for an extension of his indebtedness, and proposed as security to give a bond and mortgage on his farm in Amenia. This the plaintiff declined to accept without a covenant of security that the farm was worth enough to pay the mortgage offered. There were at the time incumbrances on the farm,—one mortgage for \$10,000, and others. Culver gave a covenant to the plaintiff, signed by the defendant, his son, by which the defendant covenanted with the plaintiff for the consideration of one dollar that the farm was of sufficient value to pay the previous mortgages, and the one given to the bank if the title of Backus Culver was good (which the defendant did not warrant); that the same should bring on foreclosure sufficient, after payment of those before the one to the bank, to satisfy the mortgage to the plaintiff. And if, upon the foreclosure of either of said mortgages, there should

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be a deficiency in the amount applicable to the \$4,000 mortgage, with interest and costs, he, Joshua Culver, would pay such deficiency to the plaintiff.

No evidence was given on the trial, but the parties admitted that Eliza Davis commenced a suit against the defendant and Backus Culver to recover a portion of the farm as one of the heirs of the previous owner. That such case had been tried, and on the second trial a verdict was rendered for the defendant, from which the plaintiff in that action appealed. That while the appeal was pending, one of the prior mortgages had been foreclosed and the property sold for a sum that left no surplus above the mortgage foreclosed, whereupon the suit of Davis was settled and discontinued.

The special term rendered judgment for the plaintiff for the amount due, and interest, which was affirmed by the general term and the defendant appealed to this court.

E. More, for the appellant.

G. Dean, for the respondent.

INGRAHAM, J. The only questions raised in this case are in regard to the construction of the covenant of the defendant; and if the construction contended for by the defendant is the correct one, whether the title to the farm of Backus Culver was defective. The covenant contained two provisions: one that the farm would if the title of Backus Culver to it was good, sell for enough to cover the prior mortgages and the one due to the bank, and the other that if upon foreclosure of either of the mortgages there should be a deficiency in the amount applicable to the plaintiff's mortgage he, the defendant, would pay such deficiency.

It seems to me hardly necessary to decide whether the defect in the title was proved, or whether if it had been, it would have affected the defendant's liability under the first part of the agreement. The latter part of the defend-

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ant's covenant bound him to pay any deficiency that might exist on a sale of the premises under a foreclosure of either of the mortgages. It was not in any manner made dependant on the previous condition, and it was by no means affected by any defect of title of Backus Culver. The mortgage foreclosure was of a mortgage given by Joshua Culver. His title was undisputed. The title given by the foreclosure was not disputed, and on the sale all claim to the premises was abandoned. There was no necessary connection between the two conditions. The first covenant was as to the sufficiency of the farm to pay all the claims upon it. This was made conditioned on the validity of the title of Backus Culver. The second was an agreement to pay any deficiency on the mortgages. It is undoubtedly a rule in the construction of contracts, that they are to be construed in the light of the surrounding circumstances, with a view to ascertain the intent of the parties. (*Waldron v. Willard*, 17 N. Y. Rep. 466.) The application of that rule would not help the defendant here. If the condition as to the title could be made applicable to the second provision it would be to excuse the defendant's liability if from such defect of title, the foreclosure became ineffectual. Where the title given is perfect, and the supposed defect does not in any manner affect the sale, there is no good reason why the defendant should be relieved from liability.

But even under the first provision of the covenant the defendant would not, as this case comes before us, be entitled to relief. The admission shows it is true that a claim had been made for a part of the property, but it also shows that the court had decided adversely to the claim and the claimant had appealed, but that afterwards the claim was abandoned and the action discontinued. It was for the defendant to show the defect in the title. A mere claim by action did not establish it, and it certainly was not strengthened by a decision adverse to the claim. Giving the defendant all the benefit he could derive from the construction of the contract as claimed by him, he has not

established any right to relief. There is no proof that the title was defective, and the evidence in the admission is that the court held the title good.

The first provision of the agreement may be read so as to contain two stipulations: 1st. that the value of the farm was enough to pay all the incumbrances upon it; and 2d. if the title of Backus was good the same would bring on foreclosure (of Backus Culver's mortgage) sufficient to pay all. With this construction, there would be no ground for applying the exception to the latter provision.

But under any view of the case there is no evidence from which we could say the title was defective.

The judgment should be affirmed.

WRIGHT, J. The question in the case is a narrow one, depending on the construction of the defendant's contract.

The words of the covenant are: "If the title of said Backus is good (which said Joshua does not warrant), the same (that is, the farm), shall bring on foreclosure sufficient after payment of those before the one to the bank, to satisfy the said mortgage to the president, directors and company of the Mahaiwe Bank, with costs of foreclosure." The plaintiff claims this to be an absolute covenant that on the foreclosure, the farm shall bring enough to pay the plaintiff's mortgage, "if the title of Backus Culver is good," and this seems to be the reading of the contract. The defendant, on the other hand, insists that the intent and meaning of the covenant is, that if Backus Culver's title to the farm is good—that is, there is no real *bona fide* adverse claim rendering it uncertain—at the time of foreclosure and sale under any of the mortgages, it shall bring a sum sufficient after paying all prior ones, to satisfy the plaintiff's mortgage; and that there was no breach of covenant, as at the time the mortgage was foreclosed and sale made, there was a suit pending on appeal, involving Culver's title to the farm—a real, *bona fide* adverse claim—which was then undetermined. But this could not have been the

intent or meaning of the parties by the expression, "if the title of said Backus is good (which said Joshua does not warrant)." The parties were agreeing for an extension of credit to Backus Culver for one year, and the plaintiff's bond and mortgage were payable a year after date, and no steps could be taken to foreclose it until May, 1858, whilst the prior mortgages upon the farm were not under the plaintiff's control, and for aught that appears, the very mortgage on which the property was sold was controlled by the defendant himself. It could not certainly, under these circumstances, have been the intent of the parties, or the meaning of the covenant, that Backus Culver's title should be good at any time any one of the prior mortgagees might choose to foreclose and sell the mortgaged premises. Again, the parties knew of the particular claim of Eliza Davis, and undoubtedly the covenant was framed in reference to it. Her suit assailing Culver's title to the farm, on the ground of undue influence and essential incapacity of his grantor, had been pending three years, and was undetermined when the covenant was made. Knowing that this pretended cloud was being asserted, the defendant agrees that if the title to his father of the farm that he mortgages to the plaintiff is good (which he does not warrant), it shall bring on foreclosure, sufficient to satisfy the plaintiff's mortgage, and all prior mortgage liens. Evidently the covenant means what it literally expresses, that the farm shall bring enough on foreclosure, to pay the plaintiff's mortgage, if the mortgagor's title is good. That is, not in fact, legally defective. The answer of the defendant did not aver any defect of title in Backus Culver, to the premises mentioned in the covenant, and the proof showed that the only person questioning it was Eliza Davis, whose claim within a month after the date of the covenant, was by the judgment of the supreme court, declared to be invalid. What was an apparent cloud, when the covenant was executed, and led doubtless to its peculiar frame, disappeared in June, 1857. Judgment went against her, and

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in favor of Culver's title, long before there could have been a foreclosure of the plaintiff's mortgage. That judgment has never been reversed; and although an appeal was brought, it was abandoned, and the action discontinued several months before the present action was commenced, and more than a year prior to the trial.

It was not therefore, averred or proved that Culver's title to the premises mortgaged to the plaintiff, was defective within the intent and meaning of the defendant's covenant. The judgment should be affirmed.

All the judges concurred, except SELDEN, J., who did not examine the case.

Judgment affirmed.

Statement of case.

JOHN BERGIN v. DOUW WEMPLE, Administrator, &c.

For work, labor and services rendered to the keeper of a county poor house, by an inmate thereof and his wife, for the benefit of such keeper and in his business, and upon his promise to pay therefor, he is liable.

The keeper of a county poor house is not entitled, any more than a stranger, to the labor and services of the paupers therein, for his own advantage, without compensation; and any contract or promise he may make to pay for such labor will be obligatory upon him.

The jurisdiction of this court extends only to the examination of the legal conclusions of the judge or referee before whom a cause is tried, from the facts found by him. The court has no power to look into the evidence, or the case at large, for the purpose of reviewing or determining questions of fact.

Appeal from a judgment of the Supreme Court.

THE action was against David Wemple, since deceased, to recover for work, labor and services by the plaintiff and his wife, performed for the defendant and at his request. The defendant answered, alleging that he was keeper of the poor house of the county of Montgomery from the 17th of April, 1853, to the 1st of February, 1856, and during all which time the plaintiff and his wife were paupers and inmates of said poor house, and were maintained and supported at the expense of the county, and that they occasionally worked and labored in said poor house, and on the premises connected therewith, for the benefit of the county, and under the charge and direction of the defendant as such keeper, which is the labor mentioned and referred to in the complaint; that they were bound and required to perform such labor, and the county of Montgomery was entitled to such labor, without the said county or the defendant, as such keeper, or either of them, being in any way or manner accountable to the plaintiff therefor. For a further answer the defendant alleged that about the 1st of February, 1856, the plaintiff and defendant accounted together of and concerning the labor

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mentioned in the complaint; and the defendant settled with and paid the plaintiff in full for all the labor thus done and performed by the plaintiff for the defendant, and which was the same labor referred to in the complaint. The answer further alleged a set-off.

The cause was referred to *Archibald McFarlan, Esq.*, who found due to the plaintiff from the defendant for the work, labor and services claimed in the complaint, with interest on the demand from the 20th March, 1855, the sum of \$189.57, and ordered judgment accordingly, for that amount, with costs of the action.

The referee found as facts: That on the 17th April, 1853, the plaintiff agreed with and hired to the defendant to work for him on the county poor house farm, in Montgomery county, at the price of \$5 per month, and be boarded, not specifying the number of months, but to work until the spring work and seeding were done. That the plaintiff commenced working on the same day, and continued to work under this agreement for the defendant, until the 8th of August, 1853. That the plaintiff again commenced work on the same farm for the defendant, at his request, about the middle of December, 1850, and continued to work until 20th March, 1854, without any price being agreed upon for this service, being three months. That such work was worth \$2.50 per month, and be boarded, making \$7.50 as the value of the service. That on the 20th March, 1854, the plaintiff and defendant made an agreement by which the plaintiff was to work for the defendant for eight months at ten dollars per month at farming business, and be boarded, and that the plaintiff did work that time for the defendant as so agreed, immediately thereafter, commencing on said 20th March, 1854. That the plaintiff, after working out for the defendant said eight months, continued on and worked for the defendant till the 3d day of March, 1855, being three months and eleven days more, at the defendant's request, but without any agreement as to the price to be paid for the plaintiff's work after the expiration of said eight

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months. That the plaintiff's services for that time were worth \$3 per month and be boarded, making \$10.

That the plaintiff's wife, Mary Bergin, worked at washing, mending and ironing, and as forewoman of the laundry department of the county poor house of said county, at the request of and for the defendant, which services the defendant promised and agreed to pay, before and when rendered, a reasonable compensation, from 1st April, 1853, till the 31st January, 1856, and that said plaintiff's wife so worked and attended to said business on an average at least two days in each week during all that time, being in all 147 weeks, and which services were worth two shillings and six pence per day, besides being boarded; and that the plaintiff's said wife rendered service and attended to the business of said defendant and said county in each week during the time said defendant was at said poor house, over and above the services so agreed to be paid for by the defendant, and when she was not so engaged more than sufficient to pay and compensate said defendant and said county for her board and clothing, and when not so engaged in the washing department. That the plaintiff had received from the defendant previous to the fall of 1853, in cash, towards and on her claim for these services, \$5 at one time, and 25 cents at another time, and in the fall of 1854, \$20, in February, 1865, \$35, and in clothing \$15, making in all \$75.25, and no more. That there never has been any accounting together or balance struck between the parties of and concerning the demand claimed in the action; nor has there been a settlement of the account claimed at any time between the parties; nor has the defendant paid the same in full, or any part thereof except the above sum of \$75.25.

The referee further found that the plaintiff and his family, consisting of a wife and four children, were emigrants, and came to this country from Ireland, in 1851. They came from Cayuga county in the winter of 1853, to the county of Montgomery, and went to the poor house in

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the latter county, and remained there as inmates until the defendant came there as keeper, on the 1st April, 1853. The plaintiff and his wife were each able-bodied, strong and healthy persons, and able to earn their own support and living when the defendant first went to keep the poor house, and were not entitled to remain in said poor house as paupers after the defendant so went there on the 1st April, 1853. Their children were also healthy and robust. The defendant took possession of the poor house and farm, as keeper, on 1st April, 1853, at a salary of \$400 a-year; and himself and family to be supported by the county at the county house, and the county to furnish a foreman only to assist him; and he, with that assistant, to work and carry on the poor house farm, and see and attend to the paupers. At this time, the plaintiff and his family were on the emigrant list or book, and were persons admitted by the commissioners of emigration at the city of New York, and were kept on said book during all the time the defendant was keeper, viz: from April 1, 1853, to February 1, 1856; the commissioners allowing and paying for such keeping, for the plaintiff and wife \$1.25 each per week, and for each of the children \$1.00 per week, during the whole time. In January, 1854, the board of supervisors entered into a written contract with the defendant, whereby the board leased to him, for the term of two years from the 1st February, 1854, the poor house farm, and he took possession under the lease on the 1st April, 1854, and continued during the term. By the terms of the lease, among other things, the defendant was to have the avails of the emigrant fund for his own use. The county was also to pay to him for each and every pauper, except transient paupers, the sum of sixty-two cents per week, and for transient paupers the sum of sixty-four cents per week; to be paid quarterly. From 1st April, 1854, to 1st February, 1856, and up to the time the defendant left the farm, the board and keeping of the plaintiff and his family were charged to the commissioners weekly at the prices above stated, and which the

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defendant received under the contract with the county, and appropriated to his own use; and, during the same time, he charged and received from the county, under such contract, the sum of sixty-two cents per week for the board and keeping of the plaintiff and each member of his family. During the whole time the defendant was at the poor house, from April 1st, 1853, both the plaintiff and his wife were able to, and did by their work earn their living and maintain themselves; and neither the plaintiff or his wife knew that after they were hired by the defendant, in the spring of 1853, they were considered and continued as paupers on the books, and in the said poor house, and for whom the defendant was drawing pay from said county and commissioners of emigration. And that the services rendered for the defendant, and for which the plaintiff seeks to recover, were not rendered by the plaintiff and his said wife, or either of them, as paupers, and to which the county was entitled; but were rendered for the defendant on contracts made with him, and on his agreeing to pay the plaintiff therefor himself.

The defendant filed exceptions to the referee's conclusions of fact; and also to his conclusion of law from the facts found, that the plaintiff was entitled to recover of the defendant the sum of one hundred and forty-three dollars and seventy-five cents principal, and interest on that sum from March 20, 1855, making in all \$189.57.

Several exceptions were taken on the trial to the admission of evidence, but no point is now made by the defendant's counsel in respect thereto.

On appeal to the supreme court, the judgment entered on the report of the referee was affirmed. The defendant now appeals to this court.

H. C. Adams, for the plaintiff.

R. H. Cushney, for the defendant.

Opinion of WRIGHT, J.

WRIGHT, J. There is nothing in this case that the court can review. Our jurisdiction extends to the correction of errors of law only, and this has been often declared. We have no power to look into the evidence, or the case at large, for any such purpose, but must take the facts found by the subordinate tribunal; and if upon any view that may be taken of them the judgment can be sustained, we have no recourse but to affirm it.

The defendant was the keeper of the poor house of the county of Montgomery, and occupied and worked the farm connected therewith, from the 1st of April, 1853, to the 1st of February, 1856, the first year having a salary, and the two last years working the farm for himself, and boarding and keeping the inmates of the poor house, under a contract by which he was to have the proceeds of the emigrant fund for his own use, and also sixty-two cents per week from the county, for each pauper. The plaintiff and his family were emigrants, and, when the defendant entered into possession, inmates of the poor house. Their names were on the emigrant list or book, and were kept thereon by the defendant during his whole service as keeper, and, whilst he had charge of the county house and farm, under his contract, he drew from the commissioners of emigration, for the board and keeping of the plaintiff and his wife, one dollar and twenty-five cents each per week, and for his children one dollar each per week, and also from the county sixty-two cents per week for each member of the family. The plaintiff and his wife were healthy and able-bodied persons, and during all the time the defendant occupied the poor house farm were able to, and did, by their work, earn their living and maintain themselves, and were not entitled legally to be considered or treated as paupers. There seems to have been a grave wrong committed by the defendant (without collusion with the plaintiff) in keeping the plaintiff and family as inmates of the county house; but that was a matter between him and the county. The case is therefore to be considered as though

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the plaintiff and his wife were properly inmates of the poor house, during the defendant's occupation as keeper. It can not be doubted that the paupers might be required to labor to a reasonable extent, and in a proper way, about the establishment; and for such labor and services rendered by direction of the keeper, not for his individual benefit, no liability would attach to any one. Hence, if the labor and services for which compensation was sought in this action were merely those required by the proper government of the institution, performed in the poor house and on the premises connected therewith, for the benefit of the county, under the direction of the defendant as keeper, neither the county or the defendant could be in any way or manner accountable to the plaintiff therefor.

But no such case is shown. The defendant, it is true, was the keeper of the county poor house, and the plaintiff and his wife inmates therein. The services, however, for which the recovery was had, were performed for the defendant, and at his request, and under and in pursuance of an express promise of recompense. The fact is found that the services were not rendered by the plaintiff and his wife, or either of them as paupers, and to which the county was entitled, but were rendered for the defendant on contracts made with him, and on his agreeing to pay the plaintiff therefor, himself. Whilst all of the plaintiff's labor was performed at the defendant's request, most of it was under express contracts, fixing the rate of compensation. The wife, also, from 1st April, 1853, to 1st February, 1856, worked two days in each week, in the laundry department of the poor house at the defendant's request, and upon his promise and agreement to pay for such services a reasonable compensation; and when not so engaged, during each week, she rendered services and attended to the defendant's business and that of the county, over and above the services so agreed to be paid for by the defendant, more than sufficient to pay and compensate the defendant and the county for her board and clothing.

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Under this state of facts, there could be no question as to the defendant's liability. It was immaterial that he occupied the station of keeper of the poor house, and the plaintiff and his wife were inmates thereof. The services being rendered for his benefit, and upon his promise to compensate therefor, he is liable. Although the keeper, he was not entitled, more than a stranger, to the labor and services of the paupers, for his own advantage, without compensation; and any contract or promise to pay for such labor would be obligatory upon him. The defendant's counsel does not question his liability, if a promise to pay was established; but, insisting that it was not, at least, so far as the wife's services were concerned, and with a mistaken view of our power, asks us to review and determine this, and other questions of fact upon the evidence. We are driven to repeat, what we have often said before, that our jurisdiction extends only to the examination of the legal conclusions of the judge or referee from the facts found by him. The referee has found that the services of the plaintiff and wife were performed for the defendant, under an agreement to pay for part thereof a compensation fixed by the parties, and for the remainder a reasonable compensation; and that such services were worth the sum of \$219, upon which claim the defendant has paid \$75.25, and no more. We are controlled by these findings, and they fully sustain the recovery.

There were various exceptions taken on the trial by the defendant's counsel to this admission of evidence. They were manifestly frivolous, and no point is now made in respect thereto.

The judgment of the supreme court should be affirmed.

INGRAHAM, J. The referee finds that the plaintiff worked for the defendant, at his request, part of the time on the county farm and part of the time on the property of Wemple, at a sum agreed to be paid monthly for his services; that the wife also worked for Wemple, and that during all

the time the plaintiff and his family were boarded in the poor house, and the cost of such board charged to the commissioners, and also charged to commissioners of emigration, the plaintiff and his family being emigrants. The plaintiff was paid by Wemple, in part, for his services, which was allowed by the referee. The referee also finds that the plaintiff and his family were able-bodied persons, and that the keeping of them in the poor house was a fraud on the public.

All the questions involved were questions of fact for the referee, and with his decision we should not interfere. We are asked to review the case upon the facts, and reverse the judgment as being against the evidence. For this there is not the shadow of an excuse. There is ample testimony to show that the plaintiff worked for Wemple; that Wemple agreed to pay a fixed rate of wages, and that he afterwards admitted his liability by payments on account. Throughout the whole case there was no evidence to show that the plaintiff was ever informed that he was working on behalf of the public, but on the contrary the fact of payments on account, and of his being sent to work on the private property of Wemple, is sufficient to contradict such a supposition.

Besides, it would not follow that the commissioners were entitled to the labor of persons paid for by the commissioners of emigration. They received pay for their board, and were not, as of course, entitled to their labor also.

When the referee finds that the plaintiff and his family were kept on the books of the poor house as paupers, and that such arrangement was a gross fraud on the county and the commissioners of emigration, and that the services rendered were not rendered by the plaintiff and his wife as paupers, but on contracts made with the defendant, his findings are amply sustained by the evidence.

There is no reason whatever for interfering with this judgment, and the same should be affirmed.

All the judges concurring, judgment affirmed.

MARY P. BRIDGER v. RICHARD WEEKS.

This court has no power to review a judgment where the judge after hearing the evidence on both sides and upon deliberation after the trial is concluded, orders judgment for the defendant, on the ground that the plaintiff has misconceived his remedy and is not entitled to the relief claimed, even if his allegations were all true; but there is no finding of facts by the judge.

The code is explicit that in that class of cases the judge must state his conclusions of fact.

Appeal from a judgment of the Supreme Court, affirming a judgment of the special term, dismissing the plaintiff's complaint, with costs.

Geo. Miller, for the appellant.

R. Jennings, jun., for the respondent.

DENIO, C. J. This case was tried before Mr. Justice BROWN without a jury. The plaintiff and the defendant are the grantees of the same person, the plaintiff's deed being the earliest in date, and the defendant's the last recorded. The action is brought to set aside the defendant's deed, or to deprive the defendant of his priority under the recording act, on the ground that he took his conveyance with knowledge of the plaintiff's deed; and furthermore that he obtained that conveyance by means of a gross fraud practised upon the common grantor. Judge BROWN decided against the plaintiff on the ground that she had misconceived her remedy and was not entitled to the relief claimed, even if her allegations were all true. But there is no finding of facts. There is an opinion of Judge BROWN contained in the return and printed in the case, containing the reasons of the learned judge in support of the conclusion to which he arrived. It does not state whether the allegations of fraud, or of notice to the

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defendant of the plaintiff's prior deed are established or not, but it is determined that even assuming them to be established, the plaintiff can have no redress in this action. We are not entitled to review a judgment presented in such a shape, as we have very often decided. It was the more necessary to have the facts ascertained; for the evidence upon the disputed points was very conflicting. The judgment was not in the nature of a non-suit, for the judge heard the evidence on both sides, and the decision was made upon deliberation after the trial had been concluded. We cannot say what facts upon the two points were really established. It is enough, however, that the code is explicit that the judge in this class of cases must state his conclusions of fact. The judgment must be affirmed.

All the judges concurred. Judgment affirmed.

Statement of case.

CALEB WHITING v. DAVID BARNEY and others, ex'rs, &c.

The rule which protects professional communications of clients to their attorneys or counsel, from disclosure, should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or anticipated. Per SELDEN, J.

Where both parties are present, at the time when a communication is made by one of them to his attorney or counsel, there is nothing confidential in the communication.

Appeal from a judgment of the Supreme Court.

THIS action was brought to set aside a bond and mortgage as usurious and void. The complaint alleged that on the 25th day of June, 1857, the plaintiff loaned of David Barney, deceased, the defendant's testator, \$366. That at the same time said deceased agreed to loan to the plaintiff the full sum of \$600, for which the plaintiff, together with his wife, agreed to execute a mortgage upon certain real estate, to secure the plaintiff's bond, which was to be given conditioned to pay a like amount. That as a condition of such loan, it was agreed that said David Barney, deceased, should receive the sum of twelve per cent as interest. That for said \$366, the plaintiff gave his note, with sureties. That afterwards, and on the fifth day of November, 1857, said David Barney advanced the further sum of \$150, and no more, and thereupon the plaintiff gave the mortgage aforesaid, which is now sought to be set aside. The defendant's answer admitted that David Barney, deceased, lent to the plaintiff \$366, June 25th, 1857, and took from him the joint note of the defendant, Samuel Barney, and Miles Abbott. That in October thereafter, said David Barney loaned to the plaintiff the further sum of one hundred and fifty dollars, for which sums the plaintiff proposed, at some time thereafter, to give a mortgage, and take up said securities. That he afterwards applied for a further loan, and that he gave to said David Barney,

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deceased, the mortgage mentioned in the complaint, sending it to him by mail, and authorizing him to endorse the balance of principal upon the mortgage, after computing the interest on the said note and money, or to send him the balance in money. That said David Barney did endorse the balance of the principal, after computing the legal interest, and that such balance was \$74.07. They denied the usurious agreement charged in the complaint. On the trial, the plaintiff introduced in evidence the testimony of witnesses taken on a former trial, under the following stipulation: "It was stipulated by the parties in open court, that the testimony heretofore taken in this action, as found in the printed case, be used on the trial of this action, except the testimony of the witness, John P. Hulbert, as follows:" It appeared that Hulbert was a practising attorney, residing at Auburn; that he was the general legal adviser of David Barney up to a short period before his death; his adviser in relation to most matters of business; at times both as to his investments and the collection of money; that he occasionally placed demands in Hulbert's hands for collection, and sometimes directed him to look for investments for him, Barney; that Hulbert did about all his law business, and his business pertaining to the completion of loans, &c. That on the 25th of June, 1857, the plaintiff and Barney came to his office together. B. remarked that he and Mr. Whiting (the plaintiff) would like to see Hulbert alone, there being other people in the office, at the time. That the three then went into an adjoining room, and had a conversation on the subject of a proposed loan of money from Barney to the plaintiff, and the terms, amount, condition and manner of effecting the same; Barney and Whiting both speaking on the subject, and addressing their remarks to each other and to Hulbert. The defendants objected to the testimony of Hulbert, taken on the former trial, as to what was said during that conversation, by the parties, on the ground that it was a privileged communication. The court sustained the objec-

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tion, and excluded the testimony; and the plaintiff excepted. The judge before whom the cause was tried, found as a fact that the bond and mortgage mentioned and described in the pleadings in this action, were not made, executed and delivered upon the usurious agreement alleged and set forth in the plaintiff's complaint. And as a conclusion of law he found that said bond and mortgage were valid, binding and legal between the parties thereto, their heirs, executors, administrators and assigns, and he decided that the defendants were entitled to judgment for a dismissal of the complaint with costs.

Judgment of dismissal being entered, the plaintiff appealed to the general term, which affirmed the judgment.

S. Giles, for the appellant.

N. S. Stephens, for the respondent.

SELDEN, J. This case presents but the single question whether the conversation between the plaintiff and the defendant's testator, in the presence of Mr. Hurlbert, comes within the rule which protects the professional communications of clients to their attorneys or counsel. Upon no subject are the decisions more directly conflicting than as to the extent of this privilege. To reconcile them is impossible. It is not difficult, however, to ascertain the source of the conflict, nor, as it seems to me, to determine, with reasonable precision, the true limits of the rule. The cases on the subject may be divided into two classes, and a mere cursory examination will show that the divergence between them grows entirely out of a difference as to the real foundation of the rule.

Its origin seems to have been this: In ancient times parties litigant were in the habit of coming into court and prosecuting or defending their suits in person. Subsequently, however, as law suits multiplied, and the modes of judicial proceeding became more complex and formal,

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it became necessary to have these suits conducted by persons skilled in the laws and in the practice of the courts. This necessity gave rise, at an early day, to the class of attorneys. To facilitate the business of the courts, it was important that these men should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party.

The most instructive case on this subject with which I have met is that of *Annesley v. The Earl of Anglesea*, before the Barons of the Irish Exchequer (17 How. St. Trials, 1139). The case was most extensively and ably argued, and very elaborately considered by the court; and the conclusion arrived at, as to the true origin of the rule in question, may be best stated in the language of Mr. Baron MOUNTENAY, who says, at page 1240: "Mr. Recorder hath very properly mentioned the foundation upon which it hath been held, and is certainly undoubted law that attorneys ought to keep inviolably the secrets of their clients, viz: That an increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ (and, as the law properly expresses it, *ponere in loco suo*) other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy, to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of those causes which they found themselves under the necessity of entrusting to their care."

To the same effect is the language of Mr. Justice PADDOCK, in the case of *Dixon v. Parmelee* (2 Verm. R. 185),

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where, in considering this question, he says: "And this distinction seems to give a clue to that which is said to be the origin of the law, which is that, in early days, suitors brought in person their complaints before the king, and afterwards his courts; that, as business increased, the administration of justice approximating to a science, and the necessity of forms sensibly felt, it became absolutely necessary that there should be a set of men to stand in the place of suitors, called attorneys, and manage their causes, to encourage which, and bring the same into practice, it also became necessary for courts to adopt a rule by way of pledge to suitors, that their secret and confidential communications to their attorneys should not be drawn from them, either with or without the consent of such attorney."

If this was the true foundation of the rule, it would follow that the protection is confined to communications made with a view to the conduct of a suit, or some judicial proceeding, and it goes most forcibly to confirm and strengthen the direct authority to which I have referred, that in the earlier cases, and while the origin of the rule was most likely to be kept in view, the doctrine would seem to have had this application. The earliest cases to be found on the subject are said to be those of *Berd v. Lovelace* (Cary's Rep. 88); *Austin v. Vesey* (id. 89); and *Kilway v. Kilway* (id. 126), in each of which the witness was excused from testifying, on the ground that he was the solicitor *in the cause*. In another case in the same report, viz: *Denio v. Codrington* (p. 143), the excuse allowed was that the witness had been of counsel touching *the matter in variance*.

In *Waldron v. Ward* (Stiles, 449), the ground of privilege was the same. Sergeant Maynard there proposed to examine a witness as to some matter "whereof he had been made privy as of counsel *in the cause*." But the chief justice would not permit the examination, saying that the witness was not bound to "disclose the secrets of his client's cause."

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So in *Sparks v. Middleton* (1 Keble, 505), Mr. Aylet who had been, as the report states, "counsel for the defendant," being called as a witness, was excused from testifying, the Court of King's Bench holding "that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since, by other persons." Although it is not *in terms* stated, yet the plain inference from the report is, that Mr. Aylet had been counsel *in the cause*. The language used, "counsel for the defendant," and "before he was of counsel," would scarcely be otherwise appropriate. Thus understood, the case holds that communications from his client to Mr. Aylet before the latter was actually employed as counsel *in the cause*, were not protected.

A precisely similar decision was made nine years afterwards, by the same court, in the case of *Curtis v. Pickering* (1 Vent. 197.) One Baker, who had been solicitor for Pickering, was called to testify concerning an erasure in a will, supposed to have been made by Pickering. Objection was made that having been *retained* as solicitor, he could not be examined. But the court held that it appearing that Pickering had made the discovery to him "before such time as he *had retained* him," he might be sworn.

It is to be observed in regard to these two cases, that in neither is it said that the communication was not *confidential*, or not made to the witness in consequence of his *professional* character, but the decision is placed upon the sole ground that it was made before the witness was retained *in the cause*.

That the opinion of Lord Hardwicke was in accordance with these cases, is shown by the case of *Vaillant v. Dodermead* (2 Atkyns, 524), where the witness demurred to certain interrogatories, on the ground that he knew nothing of the matters enquired about, except what had come to his knowledge as clerk in court. The demurrer was overruled, and the first reason given by Lord Hardwicke was, that it appeared "that the matters enquired after by the

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plaintiff's interrogatories were antecedent transactions to the *commencement of the suit*, the knowledge whereof could not come to Mr. Bristow as clerk in court, or solicitor." No notice is taken in this case of any distinction between clerks in courts, and solicitors.

But, to come down to a later period: In the case of *Wadsworth v. Hamshaw*, before Chief Justice ABBOTT, (2 Brod. & Bing. 5, in note,) one Hughes, an attorney, being called as a witness by the plaintiff, stated that the defendants "had called upon him to advise them *professionally*, respecting the dissolution of their partnership." The counsel for the defendants objected; but the chief justice, without hearing the counsel on the other side, held "that the communication was not privileged, and that the protection was only extended to those communications with an attorney which related to a cause existing at the time of the communication, or then about to be commenced." He also cited a case tried at the Midland circuit, in which the evidence of the attorney in the cause, called to prove some communication of his client, being rejected, the court upon application granted a new trial; expressly holding "that no *professional* communication was protected, except such as related to a cause." This case is important, as giving not only the opinion of Chief Justice ABBOTT, but of the whole court of Kings Bench, in a case involving no other question.

This question came again before the same judge, in the case of *Williams v. Mundie*. (1 Ry. & Moo. 31.) The action was assumpsit, for goods sold; and the defendants' attorney being called by the plaintiff, to prove that the defendants were partners when the goods were sold, stated that, "*prior to the commencement of the action* and to the period when the goods were supposed to have been sold, he had been consulted by some of the defendants in relation to a partnership then about to be entered into by them." The evidence was objected to, but the chief justice said: "I think this evidence admissible. The rule I have invariably laid down in cases of this kind is, that what is

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communicated for the purpose of bringing an action or suit, or relating to a cause or suit existing at the time of the communication, is confidential and privileged; but what an attorney learns otherwise than for the purpose of a cause or suit, I think he is bound to communicate."

Precisely the same doctrine was laid down by BEST, Ch. J., in the case of *Broad v. Pitt* (3 Car. & Pa. 418; 1 Moo. & Mal. 233, S. C.); and, in a note to the case in the latter volume, the true basis of the rule is very justly stated, as follows: "It would seem that the rule is not (as it is often put) founded on a consideration of the importance of the communications made to attorneys, nor on any purpose of protecting the *general* business which attorneys are employed to carry on. The object of the rule appears to be the proper conduct of *judicial investigations*, to which the full and free disclosure of the client, to his professional advisers, is essential."

That Lord KENYON also was of this opinion is shown by his remark in the case of *Duffin v. Smith* (Peake N. P. C. 103), that "when any thing is communicated to an attorney by his client for the purpose of *his defense*," he ought not to divulge it.

In a case before the Lord Chief Baron, at the York summer assizes, viz., *Hargreave v. Hutchinson*, Lord LYNDEHURST said that it had been held by the judges (meaning, I suppose, the twelve judges), *after consideration*, that the rule was that a communication to an attorney is privileged *if an action be pending or contemplated*."

Looking, then, at the authorities thus far noticed, at the doctrine thus enunciated, traced, as it is, to a reasonable and certain origin in the early periods of the common law, we should say that there could be very little doubt as to the true limits of the rule. But unfortunately there is another class of cases still more numerous, which indicate a different doctrine, viz: that the privilege has no special relation to suits in court or judicial proceedings of any kind, but extends to every case where a member of the

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legal profession is consulted or employed *professionally*. We must, of necessity, decide which of these two classes of cases we will follow. They are directly antagonistic, and can not both be right.

It is a marked fact, and one of great weight upon this question, that very few of the cases which give the more extended scope to this rule, refer to its origin, or to any principle of policy upon which it is supposed to rest. They seem to assume that it is because the communication *is confidential* that it is protected, and hence great difficulty is experienced in finding any limit to the privilege.

It is said that in one case the court, led, as it would seem, by the idea that the betrayal of confidence had something to do with the rule, would not permit a trustee for the plaintiffs and defendants, who had been employed by them in the purchase of offices, to be examined, and on the ground that he should not be allowed *to betray a trust*. (See 2 Stark. on Evidence, 322.)

In the case of *Wilson v. Rastall*, (4 Term R. 753), a leading case on this subject, it was seriously insisted that a confidential communication to a friend, relying upon his secrecy, was protected. Lord Kenyon, in delivering his opinion said: But in order to show that the privilege extends beyond the case of an attorney and client, a hard case has been pressed upon our feelings, of confidence reposed in a friend. But if a friend could not reveal what was imparted to him in confidence, what is to become of many cases affecting life.

This remarkable uncertainty as to the rule, has followed this question into the courts of this country. In *Holmes v. Comegys*, (1 Dall. 439), it was contended that communications to a confidential agent or factor, and in *Caps v. Robinson*, (2 Wash. C. C. R., 389), those to a *confidential* clerk, were protected.

These cases could never have arisen but for the fact that the courts, whenever they have extended the privilege to communications other than those which related to some

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existing or prospective *judicial* proceeding, without taking the trouble to recur to the origin of this rule, have assumed that the idea of a *betrayal* of confidence, or a breach of that obligation which all men recognize, to preserve inviolate a secret confided, lie at its foundation. It is upon this assumption, mainly, if not entirely, that the courts have ever extended the privilege beyond what was necessary to accomplish its original objects, as here set forth, viz: to protect those having business before the courts in the employment of skilled men to transact it. The language of the judges in many of the cases prove that in making their decisions, this idea was prominent in their minds.

The authoritative weight of this class of cases, therefore, depends in a great degree upon the correctness of this assumption. It can hardly require argument to prove that the social obligation, faithfully to guard against revealing that which is communicated in confidence, cannot by possibility, have any logical connection with the rule in question. That obligation relates solely to a *voluntary* disclosure, and can have nothing whatever to do with the policy of the law, in its efforts to ascertain truth, and administer justice. It is dishonorable in one to whom a secret has been confidentially confided, *voluntarily* to reveal it; *therefore*, the law when engaged in ferreting out this very secret, should not *compel* its disclosure. Is this sound reasoning? No one will so pretend, and yet palpable as is the distinction, its disregard through the inadvertence of the courts, has had a great deal to do with the wide departure in the class of cases under consideration, from the rule as originally laid down. I do not mean to say that the courts have deliberately placed their decisions upon this obviously untenable ground, but that their language often shows that the idea of *violation of trust* was prominent in their minds, and influenced their conclusion.

It is strongly corroborative of the view here maintained, that whenever any judge has directed his attention speci-

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ally to the origin of the rule, he has in general admitted it to be as here stated. Thus in one of the cases relied upon to support the extended rule, viz: *Greenough v. Gaskell* (1 Myl. and Keen, 98), Lord Chancellor Brougham, in the course of a very elaborate opinion, says: "The foundation of this rule is not difficult to discern. It is not (as has sometimes been said), on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. * * * But it is out of regard to the interests of justice, which cannot be upholden, and to the *administration of justice*, which cannot go on without the aid of men skilled in jurisprudence, *in the practice of the courts*, and in those matters affecting rights and obligations, which form the subject of all *judicial* proceedings."

But notwithstanding this distinct recognition by the chancellor of the true basis of the rule, which if admitted, necessarily admits the privilege to communications having some connection with judicial proceedings, he nevertheless in that very case, allows the protection to cover communications not made in reference to any such proceeding, either past, present or future; the statement of the witness being merely that they "were received by him in his capacity of confidential solicitor for Dannall, for whom he had been *professionally concerned* for a number of years." How such a conclusion could be deduced from a rule founded upon such a reason, I am unable to see; and the learned chancellor would himself, I think, find it difficult satisfactorily to explain. The question was precisely the same as that in the case of *Annesley v. The Earl of Anglesea*, *supra*, the opinion of both courts as to the true basis of the rule was the same, and yet the conclusions arrived at were directly opposite. I think very few, upon a critical examination of the two cases, would hesitate to concur with the Irish barons. It may not be improper to say, that Lord Brougham, in recurring to the origin of the rule, was giving history, a matter in respect to which he was rarely

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mistaken. His deductions from the rule involved a different mental process.

I will here refer to two other cases, as they seem to me specially worthy of notice, viz: *Mills v. Griswold* (1 Root, 383), and *Calkins v. Lee* (2 Root, 363). The question in both these cases was whether a witness is obliged to disclose, upon his oath, what the defendant had told him in confidence, and upon a *promise to keep it secret*.

In the first case, the court said: "The distinction is, where the communications are *necessary*, in the course of business, as of a client to his attorney, he may not disclose them. But where the communications are *voluntary*, as in the present case, his oath obliges him to tell the *whole truth*." In the other case it said: "If it is a voluntary communication, and the adverse party is interested in the testimony, the witness must testify."

In these two cases the court, without expending any learning upon the origin or history of the rule, and without being confused by any considerations as to the violation of confidence, and of the solemn promise of the witness not to disclose, with that plain and unerring good sense which has so often distinguished the courts of that state, went at once to the very pith of the rule of exemption. They seem to have seen that it was only because the necessity of employing attorneys to transact the business of courts, in a measure *compelled* the reposing of confidence in them, that communications to them were protected.

There are many other considerations, as well as cases, which if adverted to would throw light upon this subject. But it seems to me that enough has been adduced to make it clear, that the privilege in question is not founded upon any idea of the sacredness of confidential communications, whether made to an attorney or to any other person; nor upon any peculiar policy of the law which distinguishes the *general* business of an attorney from that of any other class in the community; but it was the result of that rule of the common law, which excused parties from testifying in their

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own cases, and of the necessity, for the convenience of the public, as well as the benefit of suitors, of having the business of the courts conducted by professional men.

Whether, therefore, the recent legislation in this state, compelling parties to testify as witnesses in their own suits, should be deemed to have removed the whole foundation of the rule, and terminated all necessity for its continuance or not, which may admit of some doubt, it follows from the views here expressed, if correct, that the protection should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated.

The judgment of the supreme court, at general and special term, should be reversed, and there should be a new trial, with costs to abide the result.

DENIO, CH. J. and WRIGHT, JOHNSON and MULLIN, J. J., were also for reversal, on the ground that both parties being present, there was nothing confidential in the communication.

INGRAHAM, J. Upon the question as to the admissibility of the testimony of Hurlbert as to what passed between the plaintiff and Barney in his presence, the decision must depend upon the fact of the attorney being the counsel for both parties. If he was only the counsel of Barney, then the decisions settle that the disclosures being made in the presence of a third party, they are not privileged. (*Griffith v. Davis*, 5 Barn. and Ad. 502; *Shore v. Bedford*, 5 Man. and Gran. 271; *Weeks v. Argent*, 16 Mees. and Wels. 816.) In *Coveney v. Tannahill* (1 Hill, 33, 40), BRONSON, J. says, in commenting on *Robson v. Kemp* (5 Esp. R. 52): "It may have been thought important that the witness had acted as attorney for both parties; for where an attorney is called in by one party to witness a transaction in the way of business with a third person, I cannot think his mouth is closed either to what he saw or heard. It is not

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in the nature of a confidential communication between an attorney and client."

I do not think the witness can be considered in any other light than as the counsel of Barney. He wanted the advice, and the object of consulting the counsel was to ascertain if the arrangement could be made legally, so that he (Barney) could get twelve per cent. on the loan. A part of the transaction was the taking of the note and payment of the money, and leaving the note in the possession of the counsel until it was endorsed and delivered, and the deposit of extra interest was made with the counsel. This was a fact within the knowledge of all the parties, and which, under all the cases, would not be privileged.

This evidence offered was an examination of a witness as taken on a former trial. The stipulation to admit such evidence, expressly excluded the testimony of this witness. There was no ground on which it could have been received, even if the court had ruled that it was not privileged; unless with the consent of the adverse party.

The objection to this evidence when offered, was solely on the ground that it was privileged, and we can only conclude that the other objections were waived, and the parties had agreed to submit the question solely on the points stated on the trial. As the objection was not made in the court below, the defendant cannot now avail himself of those grounds to sustain the exclusion of the evidence.

The judgment should be affirmed.

HOGEBOM and DAVIES, JJ. were also for affirmance.

Judgment reversed.

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OSWIN WELLES and others v. PETER S. MARCH and ISRAEL COE, impleaded with MATTHEW H. NACE.

The authority of each of several partners, as agent of the firm, is necessarily limited to transactions within the scope and object of the partnership, and in the course of its trade or affairs.

A general assignment to a trustee, of all the funds and effects of the partnership, for the benefit of creditors, is the exercise of a power without the scope of the partnership enterprise, and amounts, of itself, to a suspension or dissolution of the partnership.

No such authority as that, in one of several partners, can be *implied* from the partnership relation.

And if one partner executes such an assignment, without the consent or authority of the rest, it will be void, and will not operate to pass to the assignee the title to the firm property.

But where N., who had been the active partner in a firm, absconded, leaving it largely insolvent, first writing a letter to C. his partner, in which he declared that he could not manage the debts of the firm; that he would be far out to sea before C. could receive the letter; that he was going to California, where he would start again in business with \$2,100 of the funds of the firm, which he had taken with him; adding, "I hereby assign you my interest in the business of N. & Co.," &c.; also "Take charge of every thing in *our* business; close it up speedily," &c.; *Held* that this, under the circumstances, was a full assent on the part of N., and an authorization to C. to execute an assignment of the partnership property, and rendered an assignment executed by C. a valid and operative instrument, as against him, N.

Appeal from a judgment of the Supreme Court.

THE action was brought by the plaintiffs, as judgment creditors of the firm of Nace & Co., to set aside an assignment in trust for the benefit of creditors without preferences, of the assets of that firm. The complaint was framed to set aside the assignment on the ground that it was made to hinder, delay and defraud the creditors of the assignors, and it contained no charge that the assignment had failed for want of power to execute it, or otherwise. The only material issue presented by the pleadings was one of fraud.

The cause was brought to trial at the New York special

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term, in January, 1858, before Mr. Justice DAVIES, without a jury. The plaintiffs gave evidence, which they claimed tended to show the assignment to be fraudulent in fact, and rested. The defendants then introduced rebutting evidence. The defendant Coe (who was one of the firm of Nace & Co.) was examined as a witness. He testified that Nace, his partner, absconded on Saturday, the 19th of April, 1856, and that the letter shown to him, of that date, in the hand-writing of Nace, and addressed to the witness, was received by him on the Tuesday following. The counsel for the defendants thereupon offered the letter as evidence of the assent of Nace to the assignment to the defendant March. The counsel for the plaintiffs objected to it on the ground that no assent was set up in the answer, and that it was contradictory to the assignment, and also on the ground that the letter contains no authority or assent, and the assignment in question was not an execution of any power, except the power which one partner possesses by virtue of his partnership relations, which objection the court over-ruled, and admitted the letter in evidence, the plaintiffs' counsel excepting. The letter is as follows:

"NEW YORK, April 19, 1856.

"Mr. Coe: My dear sir—Judge not harshly of me, although I have involved you, with myself, in considerable difficulty. You will find I have in the concern, paid in cash, over \$15,000, which will pay all we owe, with the stock on hand, and leave me a surplus, after paying up Hannah & Shanks and Lockett & Pankey (whom please pay after you pay our debts), about \$9,000, say nine thousand dollars, which you will please pay over to my brother W. M. Nace, to whom I am indebted. I have given him a bill of sale of my household goods to secure him also. I will be far out to sea before you receive this. But I can not close without assuring you that every effort of my life shall be exerted to reinstate myself in public confidence. Take charge of every thing in our business; close

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it up speedily. Nace & Reinnie owe me about \$8,000, loaned in various ways. To prevent embarrassment to our new concern, I have loaned this amount in money, notes, &c. C. Storm has a mortgage on my house to secure \$2,000, which I never received from him or any one. I owe him nothing. I was to get, according to agreement, all the interest of his wife and Mrs. Ann Storm in the concern of Nace & Reinnie, but have received not the first cent.

"I take with me \$2,100, which is charged on our check books (ours and N. & R.'s). This I will use to start in California, whither I shall sail on Monday, at two o'clock.

"I hereby assign you my interest in the business of Nace & Co., and Nace & Reinnie also.

"My dear, dear children—God bless them! I shall send to my father to remain until I can claim them again. Great God! how can I atone for this act? It may drive me to self-destruction. I hoped all along to be able to pay Nace & R. out of debt, but the assets will not come in fast enough. Our own debts are maturing, and all I can not manage. Forgive me. You will lose nothing, but it will require much care to get through.

"Your friend,

"M. H. NACE."

Further evidence was given touching the question whether the assignment was made to hinder, delay and defraud the creditors of Nace & Co.

The judge found the following facts:

1st. That the firm of F. H. Boek & Co., on the 12th July, 1856, recovered two judgments against Matthew H. Nace and Israel Coe; one for \$1,074.47 and another for \$825.76; that on 16th October, 1856, they obtained three other judgments against the same defendants; one for \$847.01, one for \$847.26, and another for \$768.76. That on the 15th November, 1856, they recovered another judgment against the same defendants, together with one Charles Trowbridge, for \$1,126.07.

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2d. That during the pendency of the actions in which such judgments were recovered, and on 28th June, 1856, the plaintiffs, Danenhower & Harris, became the owners of the claims on which said judgments were recovered, by transfer from Bock & Co.

3d. That on 22d August, 1856, the said Danenhower & Harris recovered a judgment against the defendants Nace & Co. for \$656.26; on the 30th September, 1856, another for \$945.24; and on 20th October, 1856, another for \$609.35.

4th. That Oswin Welles, one of the plaintiffs, on the 28th October, 1856, recovered a judgment against the defendants, Nace & Coe, for \$1.729.14.

5th. That before the commencement of this action, transcripts of all of said judgments were filed in the proper county, and executions issued thereupon respectively, and each returned wholly unsatisfied before the commencement of this suit.

6th. That from January, 1856 to April 26, of the same year, the defendants Matthew H. Nace and Israel Coe, were copartners in trade in the city of New York, under the name of Nace & Co.

7th. That all the above mentioned judgments were recovered upon the joint obligations of said copartnership of Nace & Co., incurred by said firm, on and previous to the 19th April, 1856.

8th. That up to the said 19th April, 1856, Coe had taken no active part in the transacting of the business of the firm.

9th. That on the 19th of April, 1856, Nace absconded from the city of New York, and took with him a large amount of the assets of the firm, leaving the letter of that date directed to his partner Coe, offered by the defendants, and read in evidence herein; and that said letter was received by Coe, on the 22d April, 1856.

10th. That on the 25th April, 1856, the firm of Nace & Co. was dissolved.

11th. That after such dissolution, and before making the

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assignment to the defendant March, hereinafter mentioned, Coe sold goods of the late copartnership on credit.

12th. That on the 12th June, 1856, Coe, one of the partners, executed the assignment to the defendant March, annexed to the complaint, and read in evidence.

13th. That the letter of the 19th April, was an authority from Nace & Coe to execute the assignment.

14th. That said assignment was made on the eve of the obtaining of the first two judgments by Bock & Co., and with the intent to prevent Bock & Co. from getting a preference by execution.

15th. That after the making of the assignment, the assignee sold most of the assigned property on credit, with the connivance of the defendant Israel Coe.

16th. That the assignment to the defendant March was not made to hinder, delay and defraud the creditors of Nace & Co.

The conclusions of law of the judge were:

1st. That the defendant Coe had not the power to make such assignment without the authority of his copartner Nace, and that no interest in the copartnership property passed thereunder, unless there was such an authority; and the fact that said assignment is not preferential, makes no difference in the principle of law applied to this case.

2d. That the letter of April 19th, 1856, was an authority from Nace to Coe to make the assignment in question.

3d. That the dissolution of the firm of Nace & Coe on the 25th April, 1856, did not change the rights and powers of the partners, and the subsequent assignment by Coe was a valid act, notwithstanding such dissolution.

4th. That such assignment was a valid instrument, and passed the copartnership property to the assignee.

The plaintiffs excepted to the last three conclusions of law, and also to the 13th and 16th findings of fact, and that part of the 9th finding of fact which finds that Nace took with him a large amount of the assets of the firm.

Judgment was entered at special term for the defend-

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ants dismissing the plaintiff's complaint. On appeal to the general term from the judgment, the same was affirmed. The plaintiffs then appealed to this court.

Alex. S. Johnson, for plaintiffs.

John Sessions, for defendants.

WRIGHT, J. The action was brought against the defendants March, Coe and Nace (the two latter composing the firm of Nace & Co.), to set aside an assignment of the copartnership property, on the ground that it was made to hinder, delay and defraud the creditors of the assignors. Fraud was the only material issue presented by the pleadings; and the court found that there was none in the transaction. The case made, justified no other conclusion. The assignment appropriated the firm assets to the payment of all the partnership creditors; and the fact that the instrument was executed with the intent to prevent one of the firm creditors from getting a preference by execution, and thereby secure an equal distribution of the partnership effects among all the creditors, did not tend to establish the fraudulent purpose alleged.

But one of the partners had absconded, taking with him a large amount of the assets of the firm, and the assignment was made by the other partner. On the ground that the re-assignment was executed by Coe in the firm name, it was first claimed at the trial, that the instrument was invalid, and no interest in the property passed thereunder. The defendant Coe executed it some two months after Nace left, and it was not preferential. But it is urged, however (and this was the view of the court below), that without the consent or authority of his copartner, he had no power to make even an assignment not preferential; and further (which the court did not agree to), that there was no such consent or authority shown.

The right and power of one partner to make a general

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assignment of all the funds and effects of the partnership, to a trustee, for the payment of debts, has undergone much discussion in the courts. The point was distinctly presented to this court in the case of *Robinson v. Gregory et al.*, decided at the last December term. In that case, two of three partners made the assignment, giving preferences, without the knowledge, consent or authority of the third partner, and in his absence from the country; and he never, in writing or verbally, assented to it, but, on the contrary, dissented. We held the assignment invalid; our judgment proceeding upon the ground that it was not competent for the two partners, without the assent or authority of the third, to make a general assignment of the partnership property to a trustee, for the payment of debts. Our opinion was that no such power could be implied from the partnership relation. Each partner possesses an equal and general power and authority in behalf of the firm, to dispose of the partnership property and effects, for any and all purposes within the scope of the partnership and in the course of its trade and business. As agent of the firm he may sell or mortgage, pledge, apply or otherwise dispose of the firm effects, for partnership purposes; may assign the firm property as a security for antecedent debts, as well as debts thereafter to be contracted on its account; and there are cases holding that his authority even extends to a transfer or pledge of *all* the partnership effects directly to a creditor, in payment or for the security of a debt due from the company, though the tendency and ultimate effect of such a transaction may be to destroy the partnership business. (*Mabbett v. White*, 2 Kernan, 442, and cases cited.) But the authority of each of several partners, as agent of the firm, is necessarily limited to transactions within the scope and object of the partnership, and in the course of its trade or affairs. A general assignment to a trustee, of all the funds and effects of the partnership, for the benefit of creditors, is the exercise of a power without the scope of the partnership enterprise, and amounts, of itself, to a sus-

pension or dissolution of the partnership itself. It is no part of the ordinary business of the copartnership, but outside and subversive of it. No such authority as that can be implied from the partnership relation. It is true, that in *Robinson v. Gregory*, the assignment preferred some \$30,000 of partnership debts; but, as the question is one of power in a less number than the whole of the partners to transfer the entire firm property—not in the course of trade in which the firm is engaged, but in such manner as to terminate the partnership—whether the assignment is with or without preferences, can make no difference. The assignment in the present case was without preference, but the principle of law to be applied to it is not affected by that circumstance.

If, then, the defendant Coe executed the assignment, without the assent or authority of Nace his partner, it was void, and did not operate to pass the title to the firm property to the assignee named in it; and the judgment dismissing the plaintiffs' complaint was erroneous. On the contrary, if it appeared from the acts or declarations of Nace, either before or subsequent to the assignment, that he assented to making it, or that it was made by his authority, it was a valid act, and presented an insuperable obstacle to the plaintiffs' sustaining their action.

On this question the plaintiffs are met by the finding of the court that Nace assented to the making of the assignment, or rather that the letter left with Coe, when Nace absconded, was an authority from the latter to Coe to make it. It is true that the fact of assent is not expressly found; but the acts of Nace, and his communication to his partner, when absconding, is construed as an authority. I think this was the effect of the letter. It was in substance an assent on the part of Nace, and a full authority to Coe to make such disposition of the partnership property as he thought proper. Nace had been the active partner in the concern, and left it largely insolvent. Before leaving he wrote to Coe the letter in question. In it he declares that

he could not manage the debts of the firm; that he would be far out to sea before Coe would receive the letter; that he was going to California where he would start again in business with \$2,100 of the funds of the firm which he had taken with him, and adds: "I hereby assign you my interest in the business of Nace & Co., and Nace & Reinnie also,"—"Take charge of every thing in *our* business; close it up speedily." This, I think, under the circumstances, was a full assent on the part of Nace, and an authorization to his partner Coe to make such disposition of the partnership property as should be deemed most expedient to close up the partnership enterprise. "Take charge of everything in our business; close it up speedily;" that is, take upon yourself the entire disposition of the partnership property; close up the partnership enterprise that I have abandoned; and that you may do this effectually, and with power, I assign you my interest in the concern. After this, Nace certainly could not have been heard to object to Coe's disposition of the firm property on the ground that it had not been assented to or authorized by him.

There is no force in the suggestion that evidence of an assent or authority by the non-executing partner was inadmissible under the pleadings. The complaint treated the assignment as the act of the firm, and no charge was made that it was invalid for the reason that it was executed by one of the partners. It was asked to have the assignment declared void on the ground of fraud, and not because Coe had not the power to make it. The latter ground was first assumed on the trial, and was not an issue made by the pleadings. The defendants having this point sprung upon them at the trial, it was quite competent for them to meet it by evidence tending to show that, although the execution of the instrument was the act of one of the partners, it was assented to or authorized by the other.

Upon the whole, therefore, the legal conclusion of the judge, at special term, that the assignment was a valid instrument, and passed the co-partnership property to

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the assignee, was correct. The judgment should be affirmed.

JOHNSON, J. The ground on which the plaintiffs in their complaint sought to have the assignment set aside and declared void, was that it was made with intent to hinder, delay and defraud the plaintiffs and other creditors of the firm of Nace & Co. This, the justice, before whom the action was tried, without a jury, found not to be the fact. The alleged invalidity is now sought to be established on the sole ground of a want of power on the part of Coe to make the assignment so as to bind both partners. It was found upon the trial, both as a fact and a conclusion of law, that the defendant Coe who made the assignment in the name, and apparently, on behalf of both copartners, had authority from Nace, the other partner, to make it. Whether he had any such express authority, depends altogether upon the construction of the letter of Nace of the 19th April, 1856. I think that letter contains sufficient authority to authorize the assignment, and make it a valid and operative instrument as against him. In order to determine what power he intended to confer upon his partner in reference to a disposition of the partnership effects, we have the right to take into consideration the circumstances under which it was written. Nace was then absconding. He had involved the affairs of the partnership in ruin, and had determined to leave the country, and abandon all control over whatever was left. Under these circumstances he writes to his partner, amongst other things, "take charge of everything in our business. Close it up speedily." Also, "I hereby assign you my interest in the business of Nace & Co., and Nace & Reinnie also;" and further: "Our own debts are maturing, and I cannot manage. Forgive me. You will lose nothing, but it will require much care to get through."

I can not doubt that it was the intention of Nace, by this letter, to give to his partner, whom he was thus for-

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saking, the entire power, as far as he could, of management, control and disposition of all the partnership effects; nor that such intention is sufficiently expressed in the letter. I do not see how any other construction can be put upon this communication, under the circumstances of this case. This disposes of the whole case, and renders it wholly unnecessary to examine the question as the implied power of a partner, in such a case. The judgment should be affirmed.

All the judges were for affirmance, except SELDEN, J., who thought the letter of Nace was not good as an *assignment*, for want of consideration; and that as a *power* it was only an authority to Coe to wind up the business as a *partner*. He did not vote. Judgment affirmed.

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CORNELIUS DUBOIS, Adm'r, &c., v. ABRAHAM C. BAKER.

A promissory note, set up as a counter-claim, was alleged by the plaintiff to be a forgery. A witness who was cashier of a bank, after testifying that he was acquainted with the handwriting of the alleged maker, and that the signature to the note was in his handwriting, was asked whether the body of the note and the signature were written with the same ink. *Held* that the question was proper; the circumstances connected with the inception of the note, and the defendant's possession of it, being legitimate subjects of investigation; and that the answer of the witness, in the negative, laid a just foundation for subsequent inquiries tending to satisfy the jury of the fraudulent character of the note.

Held, also, that other questions referring to facts apparent and obvious upon an inspection of the note, as: whether there were erasures upon it? whether they were made before or after the note was written? and whether the edges of the note were cut edges, or the ordinary edges of foolscap paper? were not objectionable as calling for *opinion*. That the answers to them elicited *facts*, and facts material to the pending investigation, and having a tendency to make out the plaintiff's theory respecting the note. That as to the writing upon the erasure, or whether made before or after the body of the note was written, if that rested in opinion, it was a proper inquiry to make of the witness, who was a bank cashier, and was therefore qualified to speak as an *expert*.

Held, further, that questions put to the same witness, having for their object to elicit testimony tending to show that the note was written over the signature of the maker, and after the signature was written, were proper; and that his answer, that the note was more crowded and the words more cramped and confined than the maker's usual writing, formed an important link in the plaintiff's theory that the note was in fact written after the signature.

Held, also, that a comparison of the handwriting of the note in controversy with other writings of the alleged maker, in evidence in the cause, was allowable, for the purpose of ascertaining the genuineness of the note.

Appeal from a judgment of the Supreme Court.

THIS action was brought to recover from the defendant the amount of two promissory notes given by him to the plaintiff's intestate, Isaac Allen, in his life time, one dated May 1st, 1861, payable to said Allen, or bearer, for the sum of \$5,000, one year from date, with interest; the other dated June 25th, 1861, payable to Allen, or bearer, thirty days from date, for the sum of \$100. The amount of both

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notes, and the interest thereon, was admitted to be due upon the trial.

The defendant, in his answer, admitted the making and delivery of these notes. As a defense, and by way of set-off or counter-claim, he alleged that on the 19th day of November, 1860, the said Isaac Allen, being indebted to the defendant in various sums and amounts, for various considerations, the said Allen and the defendant, on or about the 19th of November, 1860, met together and then and there adjusted all claims and demands which the defendant then had against said Isaac Allen, at the sum of \$5,000; and it was then and there contracted and agreed that the said Allen was indebted to the defendant, for the consideration aforesaid, in the sum of \$5,000, which sum it was promised and agreed should be and was to be paid out of the estate of said Allen, one day after the death of said Allen, and should then fall due and become payable; and thereupon the said Isaac Allen made and delivered to the defendant his promissory note or instrument in writing, of which the following is a copy:

"5,000. One day after my death, for services rendered and value received, I promise to pay, and there shall be paid, out of my estate, to A. C. Baker, or bearer, the sum of five thousand dollars.

"HYDE PARK, *November 19th*, 1860.

"ISAAC ALLEN."

The questions litigated upon the trial had reference entirely to the validity of this note, and they were: 1. Whether the signature to the note was or was not genuine. 2. Whether, if the signature was genuine, the note was written over such signature, by the defendant, without the knowledge or consent of Allen. 3. Whether the note was or was not without consideration.

The verdict of the jury was against the validity of the note. No exceptions were taken to any portion of the charge of the judge, but exceptions were taken, by the

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defendant, to the admission and rejection of evidence, which were directed to be heard in the first instance at general term. The exceptions taken were over-ruled by the general term, and judgment ordered for the plaintiff for the amount of the verdict, with costs (see 40 Barb. 556), and the defendant appealed to this court.

On the trial the plaintiff produced and read in evidence two receipts of the defendant, as follows:

"\$1.00. HYDE PARK, *May 1st*, 1860.

"Received, of Isaac Allen, one dollar, in full for all services and demands up to date. A. C. BAKER."

"Received, of Isaac Allen, five dollars and sixty cents, for expenses for selling a grey horse, and other services, up to date.

HYDE PARK, *August 8th*, 1861. "A. C. BAKER."

H. A. Nelson, for the appellant.

A. J. Parker, for the respondent.

DAVIES, J. It is to be observed that the defendant claimed, in his answer, that this \$5,000 note was given to him for the sum found due to him on the 19th of November, 1860, upon an account stated, between him and Allen, and which account consisted of money lent by the defendant to Allen, for amounts due by Allen to him upon promissory notes of Allen held by the defendant; for money had and received by Allen belonging to the defendant; for a part of a bond and mortgage sold and assigned by the defendant to Allen; for goods, &c., sold by the defendant to Allen; and for work and labor, counsel and advice rendered by the defendant to Allen. And that the note is payable one day after the death of the maker and without interest. Some other items of set-off were claimed in the answer, but no question arose upon them at the trial.

Isaac Allen died on the 21st of January, 1862, at Hyde Park, where he resided for many years upon a farm of his

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own, the management and cultivation of which was his only business. He seems to have been a man of considerable estate, as his inventory amounted in 1860 to about the sum of \$40,000. He had neither wife nor children, at the time of his decease, and no one resided with him at and for some time before his death, except a woman named Mary E. Sarles, who seemed to have had the care of him, going about with him, and transacting business for him, and was of a somewhat doubtful reputation. He was eighty years of age, when he died. His eye sight had been impaired for years, and for more than one year before he died he was perfectly blind. The defendant resided in his neighborhood; he was not a professional man, and his accustomed occupation does not distinctly appear. He was frequently at Allen's house about the time the note bears date, and his relation to the deceased then somewhat intimate and confidential, for he occasionally sold the products of Allen's farm for him, paid his taxes, attended to a law suit or so in the justices' courts, collected money for him, and assisted him in the transaction of his business. Beyond these inconsiderable services, and the two receipts of the defendant produced to show that they were regarded in that light and the compensation paid therefor of a very moderate character, the defendant offered but little proof of the allegation of his answer, in respect to the money, property and services therein referred to as the consideration of the note set up. The facts disclosed on the trial would seem clearly to show that Allen was more likely to be a lender of money to the defendant than a borrower from him. And the fact of the defendant's conceded indebtedness to Allen in May and June, 1861, as indicated by the notes in suit, and the giving of these notes, afford strong ground for the belief that Allen at this time was not indebted to the defendant. And it is also to be remarked that the defendant, upon the trial, offered no evidence to show any money lent by him to Allen, any money received by him belonging to the defendant, any

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assignment or transfer of any bond and mortgage from him to Allen, any books, or account showing any entries of any items which went to make up the balance of \$5,000, found due to the defendant upon the accounting; nor did he specify, or attempt to show how much was due for money, how much for property, or how much for the alleged services tendered.

Edward Burrett, a witness for the defendant, testified that in December, 1860, he had a conversation with Allen about Baker. He said Baker was a clever fellow; that he was doing business for him, or had been, and that he intended to take care of him and pay him for what he had done; that he had given him this five thousand dollar note for his services to pay him well. He said Fowler and Miss Sarles were both present, but does not know if they heard the conversation. Both these witnesses were examined by the defendant, but they do not testify to ever having heard Allen say anything about this note, or of any indebtedness of Allen to Baker. The character of Burrett was impeached on the trial more or less, and the jury may have entirely discredited his testimony. Travis, a witness for the plaintiff, testified that since Allen's death, he had heard Baker speak of this note; said that he held a note against Allen's estate for \$5,000; he stated how it was drawn—one day after death. He said he drew the note and Allen signed it; that it was at Allen's house that he drew the note and Allen signed it; that they were alone, and nobody was to know it till after his death. No reason for the gift was assigned by Baker; he said Allen wanted to give him a present as he had done a great deal for him. The evidence undeniably established that the signature at the foot of the note was in the proper handwriting of Allen, and it also satisfactorily established that the body of the note was written by the defendant, and in different ink from that of the signature. The theory of the plaintiff's counsel was, that Baker had procured a slip of paper, upon which there were two signatures of Allen, and that one of them had been

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erased, and that over the other this note had been written. The plaintiff proved by Dr. Edward H. Parker, a witness accustomed to the use of the microscope, that he had examined the note and the writing thereof, through that instrument, and that the word "year," in the body of the note, had been erased, and the word "day" written upon the erasure, so as to make it payable one day instead of one year after the death of the maker; and that the body of the note, which was written in blue ink, had been written after it was signed with the name of Isaac Allen, which was written with black ink, because certain parts of the blue ink passed on and overlapped the black ink. The jury found a verdict for the plaintiff, thus affirming that the note was in fact a forgery.

We have only to consider the exceptions taken by the defendant upon the trial, and which are now urged as grounds why the judgment should be reversed and a new trial ordered. John F. Hull, cashier of a bank, testified that he was well acquainted with the handwriting of Allen, and that the signature to the note was in his handwriting. He was then asked by the plaintiff's counsel, are the signature and the body of the note written with the same ink? It is to be observed here that it was subsequently proved that the body of the note was in the defendant's handwriting, and was written with blue ink, and that the signature of Allen was written with black ink, and that the body of the note was written partly over and upon the signature, thus demonstrating, if this evidence was credited by the jury, that the body of the note was written after the signature had been written. This question was objected to, and admitted and exception taken, and the witness answered: "I think it is not." The defendant had produced the note and had relied upon it as the ground for establishing a debt against the estate of the deceased. All the circumstances connected with its inception and possession by the defendant, were legitimate subjects of investigation, and the position of the plaintiff not only authorized, but demanded the

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fullest enquiry into them. The question put to the witness was therefore eminently proper, and the answer given laid a just foundation for the subsequent enquiries, which satisfied the jury of the fraudulent character of the note. The next questions put to this witness and objected to are: 1. Does there appear to have been an erasure in this note? 2. Was the erasure made before or after the body of the note was written? 3. Are either of the edges of the note in question cut edges, or the ordinary foolscap edge?

These questions were objected to on the ground that they asked for the opinion of the witness. It is a mistake to assume that these questions called for opinion. The answers to them elicited facts, and facts material to the pending investigation. Whether there were erasures upon the note; whether they were made before or after the note was written, and whether the edges of the note produced had cut edges, or the ordinary edges of foolscap paper, were all circumstances having a tendency to make out the plaintiff's theory respecting the note. They are all facts apparent and obvious upon an inspection of the note, and it was competent and proper for the plaintiff to call the attention of the witness to them, and to establish them as evidence by his oath. As to the writing upon the erasure, or whether made before or after the body of the note was written, if that rested in opinion, it was a proper enquiry to make of the witness, who was a bank cashier, and was therefore qualified to speak as an expert. (Cowen & Hill's Notes, 1418, 1419; 1 Green. Ev. §440; *Moody v. Bornell*, 17 Pick. 490; *Stone v. Hubbard*, 7 Cush. 595; *Sheldon v. Benham*, 4 Hill, 131, n. b.; *Cooper v. Bockett*, 4 Moore P. C. Cases, 433.) In this latter case it was decided that where one line of writing crosses another an expert may testify which, in his opinion, was made first. The same remarks will apply with equal force to the question put to Harris, and objected to by the defendant. He was also a cashier and an expert, and these questions had for their object to elicit testimony tending to show that the note

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was written over the signature of Allen, and after it was written. He was competent to say, by comparison of this with other writings of Baker, whether it was more crowded, and the words more cramped and confined than his usual writing. The answers showed that it was so, and they formed an important link in the plaintiff's theory that the note was in fact written after the signature. A comparison of the hand-writing of papers introduced and relevant is permitted, to ascertain the genuineness of the one in controversy, and no reason is perceived why the same thing may not be done in the present instance, for the purpose indicated. This rule was distinctly laid down in *Doe v. Newton* (5 Adol. & Ellis, 574), that where different instruments are properly in evidence for other purposes, the hand-writing of such instruments may be compared by the jury, and the genuineness or simulation of the hand-writing in question be inferred from such comparison. This rule received the approval of this court in *Van Wyck v. McIntosh* (4 Kern. 442). I see no objection to the admission of the claim made by Miss Sarles upon the estate of Allen, and her release and settlement thereof. She had testified, upon the defendant's examination, that her claim was settled; that it was not what Allen had offered her, and that she was not satisfied. She was evidently under an unfriendly bias toward the plaintiff, and it seems to have been quite proper that all the facts connected with that claim and settlement should be laid before the jury, that they might judge of the cause and extent of that bias and prejudice. It affected the defendant in no other way than as showing the influences under which the witness testified.

I see no other exceptions of the defendant calling for any further observation; and being of the opinion that they were legally overruled, I am of the opinion that the judgment appealed from should be affirmed, with costs.

DENIO, Ch. J., and WRIGHT, INGRAHAM and JOHNSON, JJ., concurred.

Opinion of MULLIN, J.

MULLIN, J. The verdict of the jury was rendered on conflicting evidence, and is conclusive on the questions of fact in the case.

The only questions before the court are those arising on the exceptions to the rulings of the court on the trial as to the admission or rejection of evidence. They will be most conveniently examined in the order in which they are stated in the case.

Hull, cashier of the Fallkill Bank, a witness on the part of the defendant, was asked, on cross-examination, whether the signature and body of the note were written with the same ink. The defendant's counsel objected to the evidence on the ground that it called for the opinion of the witness, and was improper. The objection was overruled, and the defendant's counsel excepted.

If there was in fact a difference in the color of the ink used in writing the body and signature of the note, it might be quite material upon the issue as to the genuineness of the note. If the note was written at the defendant's house, on the day it was signed, and the intestate had but one bottle of ink, and that was black, and the body and signature were written in inks of different colors,—it would be a fact tending to cast suspicion on the note if not to prove it a forgery. The subject matter of the inquiry being material, it only remains to inquire whether the witness was competent to testify to it. If it was a matter which was to be determined by mere inspection of the paper, the jury were as competent to pass on the question of color as the witness. But if it involved any peculiar skill to detect the difference, then the opinion of an expert was competent.

I think we may take it for granted—in the absence of any allegation to the contrary, or objection to the evidence until it was shown that the witness had skill in the detection of forgeries—that a cashier of a bank is an expert within the rule that permits experts to give opinions upon matters peculiarly within the branch of science or art to which their skill relates. A cashier is an expert in regard

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to handwriting, by reason of the great amount and variety of it which comes under his observation, and because of the great care which such officers are required to exercise in order to avoid the numerous risks which banks incur in having their own notes, and those which they are in the practice of using daily, forged and counterfeited. Entering into the question of forgery, not unfrequently, is the question whether the ink, with which the note that is the subject of investigation is written or printed, is of the same color of the genuine notes, or whether the signatures and the body are of the same color or of different colors. It is also true that the color of ink is affected by lapse of time; some becoming darker and some lighter. An expert in the detection of counterfeits is able to appreciate these changes, and they may be quite obvious to him, while to the jury they may be wholly unappreciable.

I am, therefore, of opinion that it was competent to ask the witness the question put to him, and the objection was properly overruled.

The next question objected to by the defendant's counsel was, whether there appeared to be an erasure upon the note. The objection was overruled, and the counsel excepted.

The observations already made apply with some force to the question now under consideration. But there is another which I omitted to allude to in examining the previous question and objection, which applies to both, and that is this: The party assailing a note as forged or counterfeited, has the right to have a description of it incorporated in the record, so that the court of review, which does not usually have the original paper before it, may be informed as correctly as possible in regard to its appearance. As to all matters apparent on the face of the note, a jury are informed by mere inspection; but that information can only be got into the case through witnesses called to describe its appearance. Hence a witness with the paper before him may be asked as to the condition and appearance of the paper, and such facts are not opinions. An expert, on the other

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hand, while he may testify to the same matters, yet his peculiar province is to speak of matters connected with the paper, which it requires science and skill to discover. On either ground I think the evidence was competent.

The next question objected to by the defendant's counsel was whether the erasure was made before or after the body of the note was written? The objection was overruled.

For the reasons already suggested, I think this question competent.

The next question, whether the edges of the note were cut, or the ordinary foolscap edge, was competent for the same reason. It was descriptive of the note, and either party had the right to have a description of it in the case.

Harris, a witness, produced on the part of the plaintiff, testified that he was cashier of the Merchants' Bank, and that he knew the defendant's handwriting. Five papers, being notes and receipts, were then shown to him, and he said they were also the defendant's handwriting, and these papers were, as I infer from the case, put in evidence, being numbered 1, 2, 3, 4 and 5. He was then asked to state in what respect the character of the handwriting of the \$5,000 note, differed from the receipts and notes shown to him? This question was objected to by the defendant's counsel as improperly asking for the comparison of hands and as irrelevant.

It would seem from the evidence given in answer to this and other questions that the object of it was to show that the \$5,000 note was not written in the defendant's usual manner, but the letters were smaller and more crowded; the plaintiffs' thereby intending to satisfy the jury that the note was written over a signature of the intestate and was not a note signed by him, with knowledge of the character of the paper thus signed by him. It was competent to prove this fact. The question put was understood by the witness as calling for evidence bearing on the view of the case just suggested. The evidence called for was not therefore immaterial.

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But the witness called for a comparison by the witness of the \$5,000 note with the five papers put in evidence, thus assuming that these papers were fair specimens of the defendant's style and manner of writing notes and receipts. I can perceive no objection to asking the witness whether the writing in the \$5,000 note was larger or smaller than Allen's usual hand; nor whether he was accustomed to crowd his letters and words, or to leave considerable space between. These are facts any one acquainted with his hand writing could testify to. But the complaint is that the witness was called on to speak not from his own knowledge, but from comparison with other writings. It has been held that a witness cannot be permitted to testify to his opinion of hand writing from comparing that of the paper in question in the suit with that of other papers, proved to be genuine, unless the papers with which the comparison is to be made are in evidence in the cause; then the papers thus in evidence may be given to the jury, in order that they may, by comparison, determine a conflict of evidence in relation to the genuineness of the hand-writing in issue. (Van Wyck v. McIntosh, 14 N. Y. 439; Ellis v. The People, 21 How. Pr. R. 356; 4 Bro. 442; 5 Ad. & E. 544.)

The comparison proposed in this case was not for any such purpose. The body of the note was concededly in the defendant's hand writing—that of the signature in the intestate's. The comparison proposed was however just as improper as if it had related to the hand writing. The question was improper. But it was not answered. The witness answers from his own knowledge of the defendant's hand writing, and not from any comparison of the \$5,000 note with the notes and receipts exhibited to him. The defendant was not prejudiced by the question, and the error has not injured him.

There were three other exceptions taken to questions put to this witness, which were overruled. These questions related to whether the words in the note in question were

more or less crowded than the defendant's usual writing; whether two kinds of ink were used in writing the note—one kind in the body and another in the signature; and how the color of the ink attempted to be erased compared with the color of that in the signature.

It is impossible to say from the case whether these questions called for the opinion of the witness as an expert, or merely a description of the appearance of the note. If the former, the witness was an expert, and competent to give an opinion. If the latter, then a description of the note, in all the respects referred to in the question, was competent.

Evidence of the claim of the witness, Mary E. Sarles, against the estate of Isaac Allen, and the papers accompanying the same, was incompetent, and should have been rejected. The dealings between the witness and the intestate were wholly irrelevant to the issue between the parties then before the court. They could be used only to affect the credibility of the witness, if they were of a nature to produce that result. The only way they could be used against her for that purpose was by an examination of her in reference to such dealings. But they being irrelevant, her answers were conclusive on the plaintiff. In order to attack her reputation, otherwise than by her own oath, evidence that her character for truth and honesty is bad must be given. It was not competent to show that she had been guilty of perjury or other specific crime, for the reason that a witness is not presumed to be prepared to meet evidence of particular criminal or immoral acts, but is presumed to be at all times prepared to meet and resist attacks on his general character and conduct. (1 Cowen & Hill's Notes, 766.)

The papers relating to the claim against the estate, when received, would prove or have a tendency to prove that the witness had made a dishonest claim against it, or that she had been guilty of perjury in verifying it, or both. These facts, if facts they were, could not be proved in any

other way than by her own oral evidence, and that evidence could not be controverted.

The defendant, on the direct examination of the witness, gave no evidence that could form a basis on which to rest the admission of this evidence.

When the defendant closed the first examination of the witness, he had not alluded to her claim against the estate. The plaintiff's counsel, at the close of the cross-examination, alludes to it for the first time, by enquiring of her how much she had got out of Allen's estate. On re-direct examination, the defendant's counsel proved by her that her claim was settled, but what she got was not satisfactory to her, as it was not as much as Allen offered her. She said she went to Allen's because he came for her, and promised to do better by her than she could do for herself; and that he had given her two notes of \$500 each.

On re-cross-examination the plaintiff's counsel inquired of the witness what the amount of her claim against the estate was, and she replied she did not remember; and thereupon the papers relating to it were offered and received in evidence.

This case is not within the rule laid down at the last term in the case of *Jeffards v. The People*. In that case the mother of the prisoner was examined on his behalf, and on her direct examination testified that she was the widow of the person for whose murder the prisoner was then on trial. The district attorney, to contradict her on this point, offered in evidence an affidavit made by her some years before the trial, in which she swore that she was then the wife of a person named by her; and he also offered a deed signed by her as the wife of the same person; and these papers, with other evidence given on the trial, proved that she could not be the widow of the deceased. This evidence was received under the objection of the prisoner's counsel, and this court held it admissible, on the ground that the evidence of her relation to the murdered man, was not

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collateral to the issue, and it was therefore competent to contradict her.

The evidence of the claim, &c., in this case, contradicted nothing the witness had sworn to on either her direct or cross-examination; and it could only operate by way of impeachment, and for this purpose specific acts of misconduct are not admissible. (1 C. & H. Notes, 766.)

Evidence of the defendant's habit of carrying an inkstand at any time, was not admissible. The fact to be proved was that he had one with him on the day the note was drawn, and his habit to have one was not legal evidence that he had one at that time. It is not as convincing proof of that fact as evidence of the habit of a usurer to take usury, is that a contract made by him is usurious; and evidence of such a habit has been held to be incompetent.

The judgment should be reversed and a new trial granted, with costs to abide the event, by reason of the admission of the illegal evidence as to the claim of the witness Sarles against the estate of the intestate.

SELDEN, J., was also for reversal. HOGEBOM, J., did not vote. Judgment affirmed.

JOHN MULHADO v. THE BROOKLYN CITY RAILROAD COMPANY.

Where the plaintiff, a passenger upon a city railroad car, indicated his wish to alight at the place where the car was then stopping, by requesting the driver to keep on the brake, who replied "yes sir," but instead of suffering the car to remain stationary until the plaintiff should alight, he turned the brake and set the car in motion, thereby precipitating the plaintiff, (who was in the act of alighting,) from the car into the street, thereby causing an injury; *Held* that if the jury believed the evidence they were justified in finding the driver guilty of negligence; and that it was not the province of the court to discredit it, and nonsuit the plaintiff.

Held, also, that the plaintiff was not chargeable with any fault in that he did not prefer the request to the conductor, to stop the cars, instead of to the driver.

Held, further, that there was no fault in the attempt of the plaintiff to get off the front platform, instead of the rear one; he having got on at the front platform without objection; and it not appearing that any notice was given to passengers that they must not get off at the front platform. In an action to recover damages for a personal injury, there is no valid objection to the exhibition of the injured limb, by the plaintiff, to the surgeon called to describe the injury, before the jury.

Appeal from a judgment of the general term of the Supreme Court, affirming the judgment of a special term rendered upon the verdict of a jury.

THE facts appear in the following opinions:

———, for the appellant.

H. Morrison, for the respondent.

DAVIES, J. This action is brought to recover damages sustained by the plaintiff in consequence of the negligence of the defendants' agents. The plaintiff was a passenger on the cars of the defendants. The car stopped, and the plaintiff wishing to get out, asked the driver where the car was stopping. He replied, at the corner of Degraw street. The plaintiff said to the driver, "be so kind as to keep your brake." He replied, "yes, sir." The plaintiff then stood up. The driver was in front, and the plaintiff

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was behind him. The car started, the driver having turned the brake, and the plaintiff fell forward and was injured. This is the version of the transaction as given by the plaintiff, and it is the one which the jury must have credited. They found a verdict of \$900 for the plaintiff, and judgment was entered thereon, which was affirmed at the general term. It is claimed, on the part of the defendants, that the motion for non-suit should have been granted, as there was no evidence of negligence on the part of the defendants. This can not be justly said if the statement of the plaintiff was to be believed. He clearly indicated by his acts and words that he wished to alight from the car, at the point where it was then stopping. He made the request to the driver to keep on the brake, and such request could only be understood in the sense that he wished to get out, and desired the car to remain stationary until that was accomplished. The driver, instead of complying with this reasonable request, immediately, and while the plaintiff was in the act of alighting from the car, turned the brake and set the car in motion, thereby precipitating the plaintiff from the car into the street, causing the injury. If the jury believed this evidence, they were justified in finding the driver guilty of negligence; and it was not the province of the court to discredit it, and non-suit the plaintiff. It is also urged that the plaintiff was not free from fault, in that he did not prefer the request to the conductor to stop the car, instead of the driver. It is difficult to predicate any fault in the plaintiff from this circumstance. It is to be inferred that he was near the driver. He saw he had control of the brake, and it was natural that the request to continue the stationary condition of the car should, under the circumstances, be preferred to him. If it had been made to the conductor, who is usually stationed at the other end of the car, he would have had to communicate it to the driver either by sounding the bell or verbally. It cannot, therefore, be said the plaintiff was in fault, and himself contri-

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bute to the accident, by reason of making the request to the driver to hold on the brake until he got off, rather than to the conductor. Neither was there any fault in the attempt of the plaintiff to get off the front platform instead of the rear. It does not appear that any notice was given to passengers that they must not get off of the front platform; and as it appeared that the plaintiff got on the car at the front platform, without objection from the driver, he might well have supposed, from the absence of any notice of the kind indicated, and from the circumstance that he got on at the front platform without objection, that it was an unobjectionable place to leave the car. The attempt of the plaintiff to alight from the car was made while it was stationary. The setting it in motion before he had accomplished that was the cause of the injury, and which was clearly negligence on the part of the defendants' agent.

There is no force in the exception that the physician called to describe the injury to the plaintiff's arm should not have exhibited to him, in the presence of the jury, the arm so injured. Such exhibition certainly tended to make the description of the injury more intelligible, and it cannot be supposed that it could have had any undue influence upon the feelings or sympathies of the jury. As well might it be contended that a man who had lost an arm or a leg, by a similar injury, should not be permitted to appear before a jury to testify in relation to it, lest thereby their feelings might be influenced, and under the undue excitement created thereby they might do injustice. We cannot assume that any such consequences will follow such a course of examination; and we can not perceive that it was objectionable in the present instance.

The judgment must be affirmed, with costs.

SELDEN, J. No good reason is shown for the reversal of this judgment. The jury have found, as they had the right to do, that the injury was occasioned in the manner

testified to by the plaintiff. It was clearly a question for them to determine, under all the facts and circumstances of the case, whether the plaintiff was guilty of any negligence in undertaking to leave the car in the manner testified to by himself, and whether the defendant was guilty of negligence in permitting the car to be started while the plaintiff was in the act of leaving it. I think the verdict is right on both points, and justified by the evidence. It was clearly no case for a non-suit. Certainly it cannot, as matter of law, be regarded as negligent in a party to get off, even from the front end of a street car while it is standing, after he has requested the driver to hold his brake for that purpose, and has received his assurance that he will do so. Nor can it be held, as matter of law, that the defendant was free from negligence in allowing the cars to be started after this, while the plaintiff was in the act of getting off. It was a question of fact, and the conclusion of fact was to be drawn from a variety of facts and circumstances, neither of which was, in itself, clear and decisive. This is always the province of a jury. It was for them to consider what was intended and understood both by the plaintiff and the driver by the request and the assent proved, and to determine the weight and force of all the circumstances tending to the conclusion of the fact of negligence.

There is no force in the objection, to the exhibition of the injured limb by the plaintiff, to the surgeon, before the jury.

The judgment should be affirmed.

All the judges concurring, judgment affirmed.

Statement of case.

ORRIN NORTH v. JAMES O. BLOSS, impleaded with JAMES W. ADAMS.

The term "dormant partner" implies one who is not an active partner nor generally known as a partner. But to be such it is not essential a person should wholly abstain from any actual participation in the business of the firm, or be *universally* unknown as bearing a connection with it.

Nor does the term necessarily imply a studied *concealment* of the fact.

Where a firm consisting of three members, B. A. & M. did business under the firm name of "B. & A." and every thing in the apparent mode of transacting their business indicated that B. & A. constituted the sole members of the firm; and there was nothing to signify to ordinary dealers with the firm that M. had any thing to do with it; and there was an entire omission on the part of B. & A. to communicate the fact of such connection to one dealing with them; and actual ignorance by him of such connection, and apparent good faith on his part in treating B. & A. as the only parties interested; *Held* that the referee was right in regarding M. as a dormant partner, and therefore not necessary to be joined as a co-defendant with B. & A.

And the only ground for presuming that there was any *general* knowledge of the fact that M. was interested in the firm being the circumstance of his name appearing upon the cards of the firm, but there was no evidence that these cards were in any way circulated, or issued to a single person; *Held* that it belonged to B. & A. to bring out a fact so vital to their defence, of the non-joinder of M.

Where, in an action to recover back money paid by mistake, the referee found that the defendants were overpaid—were overpaid by *mistake*, and by mistake on a *matter of fact*; *Held* that this made the allowance for such over payment a lawful credit in favor of the plaintiff, and deprived the defendants of the benefit of the objection that the payment was a voluntary one made with full knowledge of the fact; it being neither a voluntary payment, nor made with such a knowledge of the facts as barred the plaintiff's title to relief.

Appeal by the defendant Bloss from a judgment of the Supreme Court, affirming a judgment entered on the report of a referee.

THE action was brought to recover for moneys advanced by the plaintiff to the defendants, and also for freight and commissions on garden and other seeds sold by the plaintiff for the defendants. The defenses set up in the answer were: 1st. A general denial. 2d. The non-joinder as

Statement of case.

defendant of Moses M. Matthews, an alleged general partner with the defendants. 3d. An accounting and settlement between the plaintiff and defendants, and a payment of the balance found to be due.

In the year 1855, the plaintiff was doing business as a merchant at Brockport, in the county of Monroe, and the appellants were doing business as co-partners, at the city of Rochester, as seedsmen, under the name, firm and style of "Bloss & Adams." Moses M. Adams was also a partner with the defendants, and it was a question in the case whether he was a dormant partner or not.

The plaintiff purchased clover and timothy seeds of said Bloss & Adams, amounting to \$1,121.41 or thereabouts, at different times during that year, and from time to time gave Bloss & Adams his promissory notes for such seeds, which were accepted and received by them, and upon which they realized the money, and the same were paid by the respondent. Said notes were given at various times whilst the dealings between the parties were going on, and without any settlement or looking over the state of the accounts between the parties. The notes amounted in the aggregate to \$1,189.40, making the sum of \$67.99 actually overpaid by the plaintiff to said Bloss & Adams, and claimed by the plaintiff to have been so paid by mistake. The plaintiff claimed that they were indebted to him in the sum of \$164.08 for money advanced by him to said defendants over and above all discounts and set-offs, which the defendants refused to pay. He also claimed they were indebted to and owing him in the further sum of \$164.08, being for money advanced by him at the request of the defendants.

The referee reported in favor of the plaintiff, and against the defendants for the sum of \$67.99, and judgment was entered thereon for said amount with costs. The plaintiff's claim for money overpaid by mistake was sustained, and the claim for freight and commissions was disallowed by the referee, who also reported that the action was well

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brought against the present defendants without joining Mathews.

Upon the trial, it turned out that Mathews was also a partner in the firm of "Bloss & Adams," but the fact was unknown to the plaintiff, and never communicated to him in all his dealings with the firm. Mathews took no active part in the business, was seldom at the place of business of the firm, and only assisted the firm whenever they wanted to borrow money; he would go to the bank or person of whom the firm wished to borrow money, and make known the fact of his connection with the firm, and being a man of wealth, by the use of his name enabled the firm to borrow money. There is no proof to show that the fact of his being a partner was generally known in the community where the firm was doing business, or that "Bloss & Adams" ever stated to any person that Mathews was a general partner with them. There was nothing in the firm name to indicate that anybody else was a member of the firm but "Bloss & Adams." Mathews's name was printed in full on the business cards of the firm as a member of the copartnership, but how far, if at all, they were used or circulated does not appear in the case. Upon the trial, the defendants' counsel moved to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied by the referee, and an exception was taken. On the examination of the witness Sadler, the plaintiff's counsel asked him this question, viz: Have you any knowledge how the plaintiff was selling those seeds? It was objected to by the defendants' counsel, and the objection was overruled by the referee, to which an exception was taken. The plaintiff's counsel also offered in evidence the exhibits marked A, B, C, D, F, G, H, I and K, designed to show the course of business between the plaintiff and defendants; also the notes given by the plaintiff; also the statement of the accounts between the parties, which were also objected to by defendants' counsel, the objection was

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overruled by the referee, and his decision was excepted to by the defendants. The plaintiff also offered parol proof of the existence of a promissory note which he had paid, and was unable to find, amounting to \$150, which was also objected to, and overruled by the referee, and his decision excepted to. The defendants' counsel moved for a non-suit, which motion was denied by the referee, and his decision was excepted to.

The referee upon this found the following facts and conclusions of law, viz: That in the year 1855, the firm of Bloss and Adams sold and delivered a quantity of clover and timothy seed, at Rochester, in the county of Monroe, to the plaintiff in this action; that said clover and timothy seed in the aggregate amounted to the sum of \$1,121.41, besides a quantity of garden seeds the value of which does not appear; that said seeds were received by the plaintiff, and sold by him upon his own account, and not upon any commission to be paid by the defendants, and that the plaintiff paid freight on the same from Rochester to Brockport, but no sum was specifically shown; that James O. Bloss and James W. Adams, and Moses M. Mathews, carried on business as general partners at Rochester, under the firm name of Bloss & Adams; the name of Mathews, who was a practising physician, was not in the firm name, and there were no general terms in it which would suggest to the public there were other names or partners than those expressly named in it; Mathews was not generally known as a member of the firm, and the plaintiff did not know him as such; he took no active part in the business, and was seldom at the place of business, but was so occasionally to advise and see how the firm got along; that he assisted the firm to raise money and negotiated money for the firm, and was a man of wealth; that his name was published in full on the business cards of the partnership, and his connection with the firm was never concealed nor made a secret of. The plaintiff paid at different times in the year 1855 money and gave his promissory notes, which

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were received by said firm of Bloss & Adams in payment for said seeds, and on which said firm realized the money, and which notes were at maturity paid by the plaintiff; that said notes and money amounted in the aggregate to \$1,189.40, of which the sum of \$67.99 was overpaid by mistake. The referee found, as matter of law, that the plaintiff was not entitled to recover anything for freight paid by him, nor for commissions for selling said seeds. That Mathews was a dormant partner of the firm of Bloss & Adams, and that this action could be maintained against Bloss and Adams without joining Mathews as a party defendant; that the defendant was indebted to the plaintiff in the said sum of \$67.99; that the plaintiff was entitled to judgment for \$67.99, being the amount overpaid by him to said firm of Bloss & Adams more than what the plaintiff was indebted for the seeds sold him by said firm. The defendants excepted to the findings of fact and of law so far as they were adverse to the defendants.

The plaintiff entered judgment upon said report, from which an appeal was brought to the general term of the seventh judicial district, where the judgment was in all things affirmed. This appeal is from the said judgment of affirmance.

The case was submitted on printed points by

Horace J. Thomas, for the plaintiff (respondent).

J. Van Voorhis, jr., for the defendant (appellant).

HOGBOOM, J. In the printed points submitted by the counsel for the appellant *only two* grounds are urged for the reversal of this judgment. It is unnecessary therefore to discuss any other.

The first is, that the plaintiff should have joined Moses M. Matthews as a party defendant. Matthews was no doubt a general partner, and participated in the profits and losses of the concern. But there is no evidence that he

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was generally known as such partner; or that the public, in the proper sense of that term, was ever apprised of his connection with the firm. No doubt he could have been sued and held liable on account of his actual membership in the firm, but the question is, was the plaintiff bound to join him as a defendant with the ostensible members of the firm. His name did not appear in the firm name; he did not participate except in an advisory manner in the general and ordinary business of the firm; his connection with it would not be naturally inferred from their mode of business, nor be likely to be known except to those who loaned money or extended pecuniary credit to the firm. It cannot be said that there was any *general* knowledge of the facts. The only ground for presuming such general knowledge would be the fact of Matthews' name appearing upon the cards of the firm. The difficulty is, there is no evidence that these cards were in any way circulated, or issued to a single person. And it belonged to the defendants, I think, to bring out a fact so vital to the defence. There being, therefore, every thing in the apparent mode of transacting their business to indicate that Bloss & Adams constituted the sole members of the firm—nothing whatever to signify to ordinary dealers with the firm that Matthews had any connection with it—an entire omission on the part of the defendants ever to communicate the fact of such connection to the plaintiff—actual ignorance on the part of the latter of such connection—and apparent good faith on his part in treating the defendants as the only parties interested, I am inclined to think the referee was right in regarding Matthews as a dormant partner. He finds that he was so—treating such finding it is true as a question of law—but it being in truth rather a question of fact or of mixed law and fact—a conclusion not unwarranted by the evidence in the case nor by the facts which the referee has detailed in his report. It is conceded that a dormant partner need not be joined as a co-defendant in the action. The definition of a *dormant* partner is not very clearly given in the adju-

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licated cases, or the elementary treatises on partnership. It implies, perhaps clearly enough, one who is not an active partner nor generally known as a partner. But to be such I apprehend it is not essential that he should wholly abstain from any actual participation in the business of the firm, or be *universally* unknown as having a connection with it. Nor does it necessarily imply, as I conceive, a studied *concealment* of the fact. I will not undertake to analyze the various definitions of such a partner, but content myself with a reference to some of the elementary treatises, and a few adjudicated cases. (See Story on Partnership, sec. 80; Collyer on Partnership, sec. 4; Bissett on Partnership, page 5; *Kelley v. Hurlburt*, 5 Cowen 534; *Clarkson v. Carter*, 3 Cowen 84; *N. Y. Dry Dock Co. v. Treadwell*, 19 Wend. 525.)

Even if the evidence on this point be regarded as nearly balanced, or slightly preponderating in favor of the defendants, I think we may well support the finding of the referee on rules of interpretation and review applicable to questions of fact.

It is held, in the superior court of New York, that where one person enters into a contract with two others, by name, without knowing or having, at the time, reason to suspect that they have a partner in the business to which such contract relates, such two persons may be sued without joining such third person; and he may be regarded as to such transaction, and under such circumstances, as a dormant partner, although the fact of his connection with the firm come to the knowledge of the plaintiff before the bringing of the suit. (*Hurlbut v. Post*, 1 Bosw. 36; See also *N. Y. Dry Dock Co. v. Treadwell*, 19 Wend. 525; *Clarkson v. Carter*, 3 Cowen, 84; *Clark & Bissell v. Miller & Lozee*, 4 Wend. 628; *Mitchell v. Dall*, 2 Harr. & Gill. 159, 171.)

The remaining point discussed by the appellant is that the judgment appealed from can not be sustained on the merits.

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I do not think this question is open for discussion. We cannot interfere with the conclusions of the referee on the questions of fact. There is plainly good evidence—I think preponderating evidence—to support his finding, abundant evidence to justify the refusal to non-suit, and to sustain the verdict of a jury.

It is said that the report is unsustainable because the referee has found, as one of the facts in the case, that Bloss & Adams sold the plaintiff clover and timothy seed to the amount stated in his report, besides a *quantity of garden seeds, the amount and value of which does not appear*; and that the price of the latter might well account for the apparent excess of the amount of the plaintiff's payments over his receipts.

But it is not the business of an appellate tribunal, reviewing the case simply on questions of law, to criticise with much nicety the findings of fact in order to speculate on some phases of the case which were not probably presented in the court below, or were susceptible of ample explanation there. It may well be answered that the garden seeds were not urged as an item of the defendant's claim in the court below, or were satisfactorily accounted for there in a way not necessary to be shown in the case, as no point was made thereon. Certain it is that neither the quantity nor the value of the garden seeds is shown, and cannot therefore be taken as justifying an implication against the correctness of the referee's report, nor as justifying an allowance equal to the balance which he found in favor of the plaintiff. Certain it is, also, that he found the defendants were *over-paid*—were over-paid *by mistake*—and by mistake on a *matter of fact*, which makes the allowance for such over-payment a lawful credit in favor of the plaintiff, and deprives the defendants of the benefit of the further ground taken by them, that the payment was a voluntary one, made with full knowledge of the facts. In the light of the referee's report and of the legal definition of a voluntary payment, it was neither voluntary nor made

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with such a knowledge of the facts as barred the plaintiff's title to relief.

The judgment should be affirmed.

DENIO, Ch. J., and INGRAHAM, J., were for reversal, on the grounds that the burden of proof was on the plaintiff, and that the value of the garden seeds must be shown before there could be said to be an over-payment.

All the other judges being for affirmance, judgment affirmed.

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AMBROSE W. THOMPSON v. STEPHEN KESSEL and others.

Exceptions to a referee's findings of fact cannot be reviewed in this court.

Where the testimony before a referee is conflicting upon all the material points involved in the action, and the supreme court, at general term, has affirmed the judgment, the court of appeals cannot look into the testimony, to determine whether the facts are found according to the weight of evidence.

A claim on the part of a defendant, for the price and value of the identical goods which are the subject of the action, is a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is at least connected with the subject of the action, and is strictly a counter-claim, within section 150 of the code of procedure.

Several individuals composing the firm of R., F. & Co., were sued by the plaintiff by their firm name, the complaint alleging that the names of the individual members of said firm were unknown to the plaintiff. F. only appeared and answered, in the first instance, claiming the goods sued for in behalf of the firm. He also put in a supplemental answer, in which he claimed judgment in his own favor for the value of the goods, and not in favor of himself and his copartners individually. After judgment, the defendants were allowed to amend by entering an appearance *asac pro tunc* for the other two partners, and to amend the supplemental answer, so as to make it a claim in behalf of all the members of the firm individually, with a demand for judgment in their favor. *Held*, that there was nothing for which the judgment should be reversed, in the fact that it was rendered for the value of the goods, in favor of the several individuals composing the firm of R., F. & Co.

Held, also, that the supreme court had ample power to make the amendments which were ordered, by inserting the individual names of the other members of the firm in the answer, and in the judgment, in accordance with the facts found on the trial.

Held, further, that such amendments were clearly in furtherance of justice; but if otherwise. that the order of the supreme court, allowing them, was not open to review in this court.

Appeal from a judgment of the Supreme Court affirming a judgment at special term in favor of the defendants.

THE action was brought to compel the delivery by the defendants to the plaintiff of certain bills of lading of goods consisting of sulphate of barytes and black lead, shipped

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by Messrs. Kessel Brothers of Cologne to the city of New York, and to restrain the defendants or either of them from parting with said bills, or from interfering with or disposing of said merchandise.

The complaint alleges that the goods were consigned to the plaintiff by Kessel Brothers at the instance and by the procurement of the defendant Stephen Kessel, who is claimed to have been the plaintiff's agent in the transaction and to have made advances upon the goods with the plaintiff's funds. It further alleges that the goods were thus shipped and consigned to fill certain orders sent by other persons in New York to the consignors by the plaintiff through Stephen Kessel as his agent. The complaint also alleges that the bills of lading of the goods in question were delivered over to the plaintiff by Stephen Kessel on or about the 5th day of June, 1855; that the said merchandise arrived in the port of the city of New York about the 8th of June, 1855, and that about the same time and while the bills of lading were in the plaintiff's possession, the same were surreptitiously taken by Stephen Kessel and fraudulently delivered to the other defendants Rubens, Fredricks & Co. It also avers notice to the defendants Rubens, Fredricks & Co., before any part of the merchandise had been discharged from the vessel, of the plaintiff's rights, and an offer to them to reimburse them for any and all freight they might have paid on account of said merchandise, and a demand of said bills of lading, and the refusal of the defendants Rubens, Fredricks & Co. There was also a prayer for general relief. The defendants Rubens, Fredricks & Co. are made parties by their firm name, and it is alleged in the complaint that their individual names are unknown to the plaintiff.

The defendant Stephen Kessel answered separately, denying that the shipment of the goods was made for or on account of the plaintiff, in any manner, or that the bills of lading were ever delivered to him or were in his possession, and averring that the goods were purchased by himself

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and on his own individual account; and that the bills of lading were delivered to him and were his sole and absolute property. He also denied that the plaintiff ever advanced or paid any thing on account of said goods, or ever had any interest therein, and averred that he sold and delivered to the defendants Rubens, Fredricks & Co. the said invoices and bills of lading duly endorsed, and the merchandise thereby represented, for a good and sufficient consideration paid by said firm, at the time; and that they passed the said goods through the custom house, paid the duties and the freight thereon, and received a portion thereof as they were discharged from the vessel.

The defendant, Robert Fredricks, one of the firm of Rubens, Fredricks & Co., also answered separately, denying, upon information and belief, that the plaintiff had any interest in or claim upon said goods, and averring that he bought the same, in good faith, of the defendant, Stephen Kessel, for cash and credit, and paid the cash part of the purchase and took an absolute transfer to his firm of the invoices and bills of lading, and passed the goods through the custom house, paid the duties and the freight thereon, and obtained an order from the shippers for a discharge of the goods from the vessel. That said goods were being discharged from said vessel, and a portion had been sent to the bonded warehouse, and another portion delivered to the defendants, when the further delivery was stopped by the proceedings in the action. He also averred that all his transactions in respect to said goods were for and on account of his firm, and claimed that the goods should be delivered to him, and that the defendant should pay damages for the delay in the delivery. The defendant also, by leave of the court, put in a supplemental answer, in which he alleged that, since the commencement of the action, the plaintiff had wrongfully taken possession of all the goods and merchandise in question, and converted and disposed of the same to his own use, which facts were not known to him at the time of putting in his original

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answer. He averred that the goods were worth \$2,676.37, and that the claim therein set up was made for and in behalf of himself, Abraham Rubens and William Rubens, who composed the firm of Rubens, Fredricks & Co.; and he demanded judgment in favor of said persons for the sum of \$2,676.37, with interest from the 18th day of June, 1855. To this supplemental answer the plaintiff put in a replication denying the same, except what was expressly admitted, and claiming that "the defendants, Rubens and others, who are partners in the firm of Rubens, Fredricks & Co., mentioned in the complaint herein, and whose names are unknown to the plaintiffs, ought to be made parties in making the claims set up in said supplemental answer." The action was referred, and tried before the referee, who found, as matter of fact, that the defendant, Stephen Kessel, obtained certain orders for the merchandise in question, but not as the agent or clerk of the plaintiff, nor on his behalf; and that in pursuance of said orders, and in fulfillment thereof, the said Stephen procured from Messrs. Kessel Brothers, of Cologne the consignment of the said merchandise, but not on behalf of the plaintiff. That the invoices and bills of lading of the same were delivered by said Kessel Brothers to Stephen Kessel for the purpose of executing the said orders, and that at the time of the transfer of the bills of lading to Rubens, Fredricks & Co., one James Bell was the lawful owner and holder of the said orders. That the plaintiff had advanced to Stephen Kessel, and accepted drafts from him for large sums of money, amounting in all to about \$1,900, but that such moneys were not advanced, nor were the drafts accepted to fulfill the said orders. That Stephen Kessel did not, at any time, deliver to the plaintiff the bills of lading, nor fraudulently abstract the same from his possession as alleged in the complaint, but did, on or about the 8th of June, 1855, upon a good and sufficient consideration, transfer and deliver the said bills of lading to the said Rubens, Fredricks & Co., for the purpose of the execution of said

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orders. That since the commencement of the action the plaintiff had wrongfully taken possession of all the goods and disposed of and converted the same to his own use, and that the plaintiff was, at the time, under no legal obligation to deliver the goods to the purchasers to whom he had delivered them. That at the commencement of the action the said firm of Rubens, Fredricks & Co. were the owners of the goods and entitled to possession, and that the same were worth, at the time, \$2,154.06.

As conclusions of law, the referee held and decided that the firm of Kessel Brothers had no such interest or claim as to render them necessary parties to the action. That the several partners composing the firm of Rubens, Fredricks & Co., were parties defendants in the action, and parties in making the claim set up in the supplemental answer, and were entitled to judgment against the plaintiff for the value of said goods and merchandise; and ordered judgment in their favor for said value, and interest—amounting to \$2,486.62, with costs to be taxed—and a dismissal of the complaint against the defendant Stephen Kessel, with costs. Several objections were made by the plaintiff, in the course of the trial, to evidence offered on the part of the defendants, and exceptions taken to the rulings of the referee, admitting the evidence. The only exceptions, however, insisted upon or noticed by the appellant, in his points, are those taken to the admission of evidence in support of the counter-claim contained in the supplemental answer. The only grounds of these objections taken upon the trial were that the supplemental answer was not a competent pleading in the action; and that the plaintiff was not bound to defend against the claims therein set up, and could not be charged with the value of the goods. The plaintiff excepted in due time, separately, to the several findings of fact by the referee, and also to the several conclusions of law, that the firm of Kessel Brothers were not necessary parties; that the individuals composing the firm of Rubens, Fredricks & Co., were par-

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ties in making the claim set up in the supplemental complaint, and were entitled to judgment for the value of the goods; and that the complaint should be dismissed as against Stephen Kessel. Judgment was in the first instance rendered in form dismissing the complaint as to the defendant Stephen Kessel, "and that the defendant Robert Fredricks and others, composing the firm of Rubens, Fredricks & Co., recover of the plaintiff," &c. The plaintiff brought an appeal from this judgment to the general term in the first district. After the appeal, the general term granted an order allowing the defendants, Abraham Rubens and William Rubens, copartners with the defendant Fredricks in the firm of Rubens, Fredricks & Co., to enter an appearance in the action, and the supplemental answer to be amended so as to claim the property as belonging to the individuals composing the firm, and a judgment in behalf of all for the value of the property, and amending the record accordingly. The general term affirmed the judgment. The plaintiff then brought his appeal to this court.

H. G. De Forest, for appellant.

W. Z. Larned, for respondents.

JOHNSON, J. The appellant's points are chiefly occupied with a discussion of the findings of fact by the referee. But the exceptions to the findings of fact cannot be reviewed here. The testimony before the referee was conflicting upon all the material points involved in the action, and the Supreme Court, at general term, has affirmed the judgment. This court therefore cannot look into the testimony, to determine whether the facts are found according to the weight of evidence. There was necessarily a judgment against the plaintiff, and in favor of the defendants; and the only question is whether the proper judgment has been rendered. This depends mainly upon the questions, whether the matter set up in the supplemental

answer of the defendant Fredricks, is a counterclaim within the spirit and meaning of the code, so as to entitle the defendants, or either, or any of them, to affirmative relief; and whether that answer is available to the other individuals composing the firm of Rubens, Fredricks & Co. who are made defendants in the action by the summons and complaint by their firm name only.

There can be no doubt; I think, that the matter thus set up was strictly a counter claim within section 150 of the code. It was a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or was at least connected with the subject of the plaintiff's action. It was for the price and value, of the identical goods which were the subject of the action. The question at issue before the supplemental answer was put in, was, which party had the title, or the right to control and dispose of the property.

I do not think it lies with the plaintiff, under the circumstances of this case, to allege that his taking was a mere tort, for the purpose of defeating the counter-claim. And even if an action, sounding in tort, might be maintained by the defendants Rubens, Fredricks & Co., for the taking while the action to determine the title was pending, I am still of the opinion that the cause of action for the value of the goods would constitute a good counter-claim in such a case as this. It existed in favor of certain of the defendants in the action, in whose favor a several judgment might be had against the plaintiff, and the plaintiff might also have had a separate judgment against them. The conditions of the code, therefore, are all fulfilled in respect to this claim of the defendants.

I see nothing for which the judgment should be reversed in the fact that it is rendered for the value of the goods, in favor of the several individuals who compose the firm of Rubens, Fredricks & Co. These defendants were prosecuted by the plaintiff by their firm name, he alleging in his complaint that the name of the individual members of

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said firm were unknown to him. Fredricks only appeared and answered in the first instance, claiming the goods in behalf of his firm. He also put in the supplemental answer in which he claims judgment in his own favor for the value of the goods, and not in favor of himself and his copartners individually. After judgment the defendants were allowed by the court, at general term, to amend by entering an appearance *nunc pro tunc* for the other two partners, and to amend the supplemental answer so as to make it a claim in behalf of all the members of the firm individually, and a demand for judgment in their favor. It does not appear from the record how many of these defendants had been served with process, nor why the two who were allowed to appear so as to bind them by the judgment, did not appear at an earlier stage of the proceedings. It is suggested in the respondents' points that these two defendants were residents of a foreign country, and were not served with process. But however this may be, the facts, it is to be presumed, were all before the court when the order granting the amendment was made, and it was an order they had clearly the right to make under section 173 of the code. The case had been fully tried upon its merits, and the amendment was only in furtherance of justice. And where the question is one of a common or general interest of several persons, one or more may be allowed to sue or defend for the benefit of the whole. (Code, § 119.) It was wholly unnecessary to bring in the firm of Kessel Brothers. They did not pretend to have any title to the property, or right of control over it. But even if they were to be regarded as the general owners, the defendants, who were in fact consignees, could recover the value of the property converted by a stranger.

I am of the opinion, therefore, that the judgment is right and should be affirmed.

DAVIES, J. (After stating the facts.) It is apparent that on the trial before the referee, the firm of Rubens,

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Fredricks & Co. were regarded as the claimants of the goods in controversy. And they were properly so regarded. That firm was made the parties defendants by the plaintiff, with the defendant Kessel. He alleged in his complaint that the bills of lading for said goods had been wrongfully delivered by the defendant Kessel to that firm; and that said defendants, Rubens, Fredricks & Co., paid the value therefor, and had notice of the plaintiff's rights. That he had demanded said bills of lading of that firm, and that the firm refused to deliver the same, and claimed a right to hold the same, and to be entitled to the possession of the said merchandize described therein. The plaintiff thus made the firm of Rubens, Fredricks & Co., the substantial defendants in the action, and as such they were treated in all the proceedings. The answer interposed, although in form in the name of the defendant Fredricks, was distinctly stated to be in the name and on account of the firm of Rubens, Fredricks & Co., in whose name, and for whose account the said transactions in the answer set forth were made. The supplemental being in continuation of the original answer, is to be construed in connection with it, and the counter-claim therein made, is to be taken and deemed a counter-claim made and interposed on behalf of the said firm of Rubens, Fredricks & Co. The defendant Fredricks individually did not set up or pretend that he had any individual interest in said goods, or in the bills of lading, or that individually he had any counter-claim against the plaintiff. The plaintiff's action was against the firm, and the answers are to be regarded as those of the firm. If this were not so, it is very clear that under the code, the supreme court had full authority and ample power to make the amendment which was ordered, by inserting the individual names of the other members of the firm in the answers and in the judgment. Section 173 of the code authorizes the court, before or after judgment, in furtherance of justice, on such terms as it may deem proper, to amend any pleading, process or proceeding, by adding or

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striking out the name of any party, or by correcting a mistake in the name of a party; or a mistake in any other respect; or by inserting other allegations material to the case; or where the amendment does not substantially change the claim or defense, by conforming the pleading or proceeding to the facts proved. The supreme court in this case ordered the amendments by amending the judgment in accordance with the facts proved on the trial, on the terms of affirmance of the judgment, without costs of the appeal. These amendments did not substantially change the claim of the plaintiff, or the defense interposed. They were, in fact, in harmony with both, and the power might also be sought for, in the authority given to add the name of any party, or to correct any mistake in the name of any party. The amendments were clearly in furtherance of justice, but if they were not, the order of the supreme court making them, is not open to review in this court. (*New York Ice Company v. North Western Insurance Company*, 23 N. Y. 357.) The facts found by the referee are conclusive that the firm of Rubens, Fredricks & Co. were the owners of the goods, and entitled to retain them as against this plaintiff. He having got possession of them, and converted them to his own use, they had a valid claim against him for the value thereof. This counter-claim arose directly out of the transactions set forth in the complaint as the foundation of the plaintiff's claim, and was connected with the subject of the action. (Code, § 150, sub. 1.) It was properly set up in the answer, and correctly passed upon by the referee. The facts proved by him, show that his conclusions of law thereon were correct, and the supreme court rightfully affirmed the judgment.

The judgment should also be affirmed by this court.

SELDEN, J. was absent. All the other judges being for affirmance, judgment affirmed.

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JOHN D. VAN BEUREN and wife v. JOHN B. DASH and others.

By the true construction of the provision of the Revised Statutes to prevent lapses in devises in certain cases (part 2, ch. 6, tit. 1, art. 8, § 52), the word *descendant*, wherever occurring, is limited to issue in any degree of the person referred to, and does not embrace collateral relations.

Accordingly, where a testatrix devised separate aliquot shares of her real estate to two sisters and to certain nephews and nieces, several of whom died in her life-time, some leaving children, and others without issue; *Held* that the shares of all those devisees so dying before her, lapsed, and that such shares descended to her heirs at law.

Held, also, that the circumstance that three-fifth parts of the whole estate devised, had lapsed under the foregoing rule, did not authorize the court to declare the whole will void.

THIS action was brought for the partition of certain lands in Queens county and in New York. The parties claimed title from Mrs. Hannah Bowie. She died in 1841, without parents, husband or children surviving her. She left a will, dated 12th July, 1834. By her will she devised all the real estate of which she should die possessed to her niece Lucretia A. Brazier, during her natural life, and at her decease she gave the said real estate to the children of her sister Mary, one-fifth, to Elizabeth Brazler her sister one-fifth, to Daniel B. Dash and Ann Van Beuren, and their heirs, one-fifth, to Margaret Wood her niece one-fifth, and to Ann Catherine Dash, her sister, one-fifth.

Daniel B. Dash and Ann Van Beuren, who would have taken one-fifth under the will if they had lived, died before the testatrix, each leaving children, and Ann Catherine Dash who would have taken one-fifth if she had lived, died before the testatrix, intestate and unmarried.

The only question raised in the courts below was whether the shares devised to those devisees, who died before the testatrix, descended to the heirs-at-law of the testatrix, or vested in the children or heirs-at-law of the devisees.

The special term of the supreme court held that the

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estate vested in the heirs-at-law of the devisees, and that the devises did not lapse. On appeal the general term reversed this decision, holding that the devises lapsed and the lands passed to the heirs-at-law of the testatrix. From this decision appeal was taken to this court.

M. S. Bidwell, for the appellants.

The appellants submit that their case can be supported on three distinct grounds:

I. Under the revised statutes (2 R. S. 66, § 44 [52]);

II. On the true construction of the will;

III. If these should be overruled, then on the ground of a general intestacy as to the real estate, except the devise of a life estate to Lucretia Brazier.

1. On the first ground, the appellants submit that the nephew and niece of the testatrix, named in her will, were "descendants" within the operation of the statute. (2 R. S. 66, § 44 [52].) 1st. Within the meaning of the language according to a reasonable construction. 2d. If not within the language, yet within the equity of the statute.

2. On the second ground, they submit that if the foregoing proposition should be overruled, then, according to a just and fair construction of the will, the heirs of the nephew and niece, named in the will, are entitled to take as devisees by way of substitution in the place of their deceased parents, the devise being construed as if it were in terms a devise to such nephew, &c., or his heirs.

3. If these points should be overruled, they submit that as such a construction of the statute and devise will work a destruction of three-fifths of the devise of the remainder, it must be presumed to be inconsistent with the general intent and purpose of the testatrix to uphold the devise in favor of the devisees of the other two-fifths, and, therefore, that there should be held to be an intestacy of the entire remainder.

I. The statute provides that whenever any estate shall

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be devised to a child or other descendant of the testator, and such devisee shall die during the lifetime of the testator, leaving a child or other descendant who survives such testator, such devise shall not lapse, but the property so devised shall vest in the surviving child or other descendant of the devisee, as if such devisee had survived the testator and had died intestate. (2 R. S. 66, § 44 [52].) This is unquestionably and, indeed, emphatically a remedial statute. A remedial statute should receive favorable consideration and a liberal construction, so as to advance the remedy and enlarge rather than confine its operation, and thereby to promote the object and purpose and carry out the spirit of the legislature. This is an established and familiar doctrine; and it must be presumed, therefore, that it was the intention of the legislature that it should be construed in this manner. (Dwarris on Statutes, 719 [9 Law Library]; Sedgwick on Statutes, 359 *et seq.*; 1 Kent's Com. 465; *The Mayor of New York v. Lord*, 17 Wend. Rep. 285, 292; *The Dean and Chapter of St. Peter's, York, v. Middleburgh*, 2 Younge & Jervis's Rep. 196, 215; *Bearpark v. Hutchinson*, 7 Bing. Rep. 178.) This rule should be applied in considering the following question: Is that statutory provision (unquestionably a remedial and most reasonable provision) confined to lineal descendants of the testatrix? or does it not extend to other descendants of the testatrix?

1. (a.) The very statement of the question carries on the face of it an answer; for it proves, *ex vi termini*, that lineal descendants are not the only descendants of the testatrix; and, as the statute is not in its terms confined to lineal descendants, other descendants come within its beneficial and most equitable and reasonable operation, according to the ordinary and proper use of language.

(b.) And so they do, according to the technical language of the law, and of that part of the law which relates particularly to such subjects. One to whom lands descend must surely be a descendant of him from whom they

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descend. "Descent is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law." (Chitty on Descent, 2, 3, 44; 2 Black. Com. 201; Co. Litt. 13 b. 237, a. b.; 3 Kent's Com. 374.) "On failure of lineal descendants the inheritance shall descend to his collateral relatives living of the blood of the first purchaser." (Chitty on Descent, 44.)

(c.) Our statutory law speaks the same language. It uses the term "lineal" descendants to designate one description of descendants; and it declares that if there be not lineal descendants, the real estate of an intestate shall descend to collateral relatives. (1 R. S. 751, § 1; 1 R. S. 752, §§ 7, 8; 1 R. L. 52, § 3.) Why should this expression, "lineal descendant," be used by writers and in statutes so universally, if all descendants must necessarily be lineal descendants? How can land descend to one who is not a descendant?

(d.) This distinction between lineal and collateral descendants is no novelty, but has been recognized from the earliest periods. "Descent is of two sorts; either lineal or collateral. Lineal descent is when a descent is conveyed in the same line of the whole blood; as grandfather, father, son, son's son, and so downward. Collateral descent is out in another branch, drawn from above of the whole blood; as grandfather's brother, father's brother, and so downward." (Termes de la Ley, voc. Descent.) "Lineal descent is conveyed downward in a direct line. Collateral descent is derived from the side of the lineal." (Co. Litt. 10, 6.) "The division of estates are of two kinds: 1st. Lineal descents, as from the father or grandfather to the son or grandson. 2d. Collateral or transversal, as from brother to brother, uncle to nephew, or *e converso*." (Sir MATTHEW HALE, Ch. J., Ventr. 415; Com. Dig. Descent. [c. 14.]) "Collateral descent is that which takes place to persons who spring out of the whole blood, as another branch thereof, such as the grandfather's brother and so downward." (Chitty on Descent, 88, 89.) "Descent

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is either lineal or collateral. The latter is that which springs out of the side of the line or blood." (Encyclopædia Britannica, voc. Descent.)

(e.) The principle involved in the question in this case has in fact been declared and established by the highest authority, in the case of *McCarthy v. Marsh*, (1 Seld. R., 263.) In that case, the question arose under another clause of the same code, (1 R. S. 754, § 22,) which enacts that no person shall be precluded from inheriting by reason of the alienism of any ancestor of such person. It was decided in that case, upon full and careful consideration, and after a very elaborate argument, that a man might, within the meaning of this law, be an ancestor of one who was not his lineal descendant, but only a collateral relative. According to every rational use and interpretation of language, applied to such subjects, ancestor and descendants are correlative terms; and it cannot properly or reasonably be said that a man is not the descendant of his ancestor.

(f.) This agrees with the views of an eminent philologist and lexicographer, who is celebrated, particularly, for the accuracy and exactness of his definition. Webster defines a "descendant" as any "person proceeding from an ancestor in any degree."

(g.) That there is nothing absurd or extraordinary in this extended meaning of the word, is proved by the definition contained in the British Statute, 3 and 4 Will. 4, Ch. 106, § 1, which declares that the word "descent" shall mean the title to inherit, by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue, and that the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor.

(h.) It appears, therefore, that in such a case as this, a nephew is a descendant of the testatrix: 1. According to popular speech and common parlance; 2. According to technical and legal phraseology—the phraseology of jurists

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and legislators; 3. And according to exact and critical philology.

(i.) Such, therefore, is the meaning of the word in the statute, according to a rigid and literal construction of the very language used. *A fortiori*, it is to be adopted in the liberal and benign spirit in which a remedial statute is to be construed.

2. (a.) But if this construction be not admissible, the case, at all events, comes within the equity of the statute; the decisions are almost innumerable in which the courts have extended the operation of a statute beyond the meaning of the language, to cases within its equity; that is, to cases of the same kind, and to which the principle contained in the statute is fairly applicable. The doctrine was laid down clearly and fully in the earliest period of our common law jurisprudence, and has been applied, freely and constantly, at all times since. (Plowd. R., 465, 467, 36, 53, 59, 82; Co. Litt., 24 b, 365 b; 4 Co. R., 4, 2, 6; Vin. Abr. Statute Construction, [E.] 6, pl. 38, 39, 41, 43, 44, 45, 53, 54, 55; Dwarrris on Statutes, 718, 723, 726, 728; Sedgwick on Statutes, 296 et seq.; Com. Dig. Parliament, [R.] 13, 15; Bac. Abr. Statute [I. 6.]; 1 Sugd. on Powers, 173, [15 Law Liby.]; Ex parte Roberts, 3 J. C. R., 43; *Meacham v. Sternes*, 9 Paige R., 398; *Cole v. Savage*, 10 Paige R., 590, 591; 2 Rolle R., 500; Wynch R., 123; Sir W. Jones, 39; *Garrison v. Howe*, 17 N. Y. R., 465, 466; *Owens v. Carson*, 2 Vern. R., 237; 1 Eq. Ca. Abr., 3 pl. 6; *Williams v. Routledge*, 2 Burr. R., 747; *Young v. Ames*, 2 Burr. R., 901.) This principle of extending a precept beyond the import of the language to cases *ejusdem generis*, is of general and familiar application, and is introduced frequently into discourses from the pulpit. An instance of it is to be found in Dr. Paley's sermon on Pure Religion.

(b.) This doctrine is peculiarly just and proper in its application to remedial statutes. Lord Mansfield declared that "in remedial cases the construction of statutes is extended to other cases within the reason or rule of them."

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(*Atchison v. Everett*, Cowp. R. 382, 391.) And Dwarris refers to a case in one of the old reports in which it was said, "It gives a remedy which was not at the common law, and therefore, shall be taken by equity." (Dwarris on Statutes, 719.) Chancellor WALWORTH says: "A remedial act is to be construed liberally to carry into effect the intention of the legislature; and it may be extended, by construction, to other cases within the same meaning, though not within the words of the statute." (10 Paige's R. 590.) And he adduces examples in illustration and proof of this principle; indeed, he acted in 9 Paige's R. 399, 403, upon this principle. That this is a case within the equity of the statute, within the reason or rule of the statute, cannot for a moment be doubted. The revisers, in proposing this provision, made the remark: "It is presumed that this section only requires to be read to be admitted as perfectly just." (3 R. S. 2d ed. 633.) No argument can be necessary to prove that the same reasons which render such a provision just in favor of lineal descendants, apply to a collateral relative, and that it is as necessary to prevent injustice in one case as in the other.

(c.) Such a construction will effectuate the intentions of the testatrix; a contrary construction will defeat such intentions and work injustice. The doctrine of lapsed devises in such cases was founded on artificial reasons which no testator knew or could appreciate. There can be no reasonable doubt that it defeats the intention of testators; no one in making such a devise intends to make it a condition that at his death the devisee shall be living, and that if he died the previous day, the estate devised should not go to his heirs, although it would if he lived a day longer; on the contrary, it is intended by the testator to be a boon and benefit to him and his family; that is, undoubtedly, the object, intention and expectation of testators in such cases. The rule has worked injustice and frustrated the designs of testators; this construction will obviate such

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injustice and disappointment of testators' intentions, and ought therefore to be adopted.

3. (a.) The clause under consideration was introduced into the revised statutes upon a suggestion of the revisers, contained in the following note: "It is presumed this section only requires to be read, to be admitted as perfectly just. It is taken from the laws of Massachusetts, vol. 1, p. 94, section 8, and the laws of Virginia, 1 vol. revised code, page 376, 3." This note implies that there was no substantial difference between the laws of those several states respectively, on this subject, or between those laws and this provision. The law of Virginia is expressed in the same language as that contained in our revised statutes, viz: "When any estate can be devised, &c., to any person, being a child or other descendant of a testator." The law of Massachusetts is in these words: "When any child, grandchild, or other relation, shall die, &c." The revisers evidently considered these laws substantially the same; this is apparent from the note which has been cited, and from their not pointing out any distinction or any reason for a preference of one to the other. It may fairly be inferred that such was the understanding of the legislature in enacting the law. We have good reason, therefore, to believe that the expression in the revised statutes, a child or other descendant of the testator, was used by the legislature as equivalent to the expression (used in the law of Massachusetts), a child, grandchild, or other relation of the testator, which of course would include nephews.

(b.) This consideration seems to have received little or no attention from the surrogate in the case of *Armstrong v. Moran* (1 Bradf. R. 314). He assumes that the difference in language between the revised statutes and the Massachusetts statute was material, and that it indicated an intention to adopt a different rule from the latter. But could the revisers say it was taken from the law of Massachusetts, if they intended to propose not the adoption of that law but one materially different from it? If, however,

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they considered the laws of Massachusetts and Virginia substantially alike, they might reasonably, and would naturally, say of this provision that it was taken from the laws of those states. It is a fair inference, therefore, from this note, that they understood this provision to be substantially the same as the law of Massachusetts, and it is reasonable, therefore, to suppose that the Legislature which adopted it, upon this recommendation, understood it in the same way. It seems proper to make this observation upon the opinion of the surrogate, because it will undoubtedly be much relied upon; although it is not an authority, being a decision of a subordinate and inferior court, and a court, moreover, which has no jurisdiction of questions of the law of real property. The opinion was also *obiter dictum*, as the parties claiming could not sustain their case even if the word "descendant" had been interpreted as correlative of "ancestor," not being next of kin entitled under the statute of distributions. The surrogate has quoted some remarks of Lord ELDON and others, on the force and meaning of the word descendant, but they are not applicable to the case. They were designed to express the opinion that the word "descendant," in the case then under consideration, included all lineal descendants, and not merely those in the next degree; but they had no reference to the question whether they were not as broad in their operation as the correlative term "ancestor."

4. The question, however, is not whether the words "descendants" of a person may not, in deeds or wills, sometimes mean those only who are his issue; but the question in this case is whether, in this statute, which forms a part of a code, it may not, without any unwarrantable violence, be construed as a correlative of the word "ancestor" used in a statute, which is in *pari materia*, and which forms a part of the same code; whether, as the word "ancestor" means any relative of one from whom property descends, the word "descendant" may not, upon sound principles of

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analogy, mean any relative to whom property comes by succession or descent; whether a person who is in the line of descent as to such property is not, within the intention and meaning of the statute, a descendant; that is the question in this case.

II. But if this clause of the revised statutes should be construed so strictly as to apply only to lineal descendants, and can not be extended, even by equity, to other cases which seem to be within the same reason and mischief, it will be proper to consider the language of the will, in connection with the other provisions of the revised statutes.

1. There are two provisions of the revised statutes to be considered in this connection: 1st. The term "heirs" is not requisite to create or convey an estate in fee. (1 R. S. 748, § 1.) 2d. A person is authorized to devise, at any time, all the real estate which he may be entitled to devise at the time of his death. (2 R. S. 57, § 5.) This is virtually a declaration or enactment that a will of real estate, like a will of personal property, may speak as at the testator's death. (4 Kent's Com. 541 to 543; and see also *Blaney v. Blaney*, 1 Cush. R. 107, 116.) In this connection, also, some well-settled rules of construction of the common law may be considered.

(a.) To support a devise or effectuate the testator's intention, the word "and" may be construed as synonymous with the word "or." (1st Pow. on Dev. by Jarm. 379, 380, 384, [5 Law Lib. N. S.].) This construction has often been made. (3 Atk. R. 408; 3 Ves. R. 454; 7 id. 458; 1 Cox R. 112; 1 Ves. Senr. 20; 2 Keen, 272, 273; 2 Yo. & Coll. Ch. R. 299; 1 Wend. R. 396, 397.)

(b.) When an instrument cannot operate in the way the party executing it intended, it may, (to effectuate the purpose and object which the party had in view,) operate in a way not intended. (*Roe d. Wilkinson v. Tranmarr*, Willes' R. 684; Broom's Maxims, 237, et seq., [34 Law Library, N. S.].)

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(c.) Where there is in a will a general intention consistent with the rules of law, but it cannot be carried into effect in the way the testator had designed or intended, the court will give effect to this general intention, though the particular mode of accomplishing it, which the testator contemplated, should be disregarded; or, as it is sometimes expressed, the general intention is to prevail though the particular intent should be sacrificed; in other words, the principal object which the testator had in view is paramount to the particular way of attaining it. Accordingly, where there is a limitation for life "and no longer," to a person unborn, with remainder in tail to his first and other sons, as they cannot take as purchasers but may take as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed as an estate tail in the person to whom it is expressly limited for life and no longer. (*Robinson v. Robinson*, 1 Burr. R. 38, 50 to 52; 3 T. R. 96. *Chapman v. Brown*, 3 Burr. R. 1626, cited by the Master of Rolls, 2 Ves. Jr. 365.) In such a case, the court, in order to carry out the principal or paramount intent, will construe an express estate for life into an estate tail and expunge the limitation in tail to the sons. (See an analogous decision of Lord KENYON cited by the Lord Chancellor, 2 Ves. Jr. 711. See also 1 Peere Williams, 382; 1 Eden's R. 119, 129; 2 Wils. R. 322; Wilm. Opin. 222; 2 B. C. C. 54, 55, 56; 4 Ves. Jr. 329; 12 Mass. R. 543; 3 Pet. R. 117; 5 B. P. C. 278, [3 id. 180, Toml. Ed.]; 4 T. R. 82, 87; 5 id. 299, 303; 7 id. 529, 530; 8 id. 9; 11 J. R. 170, 172; 1 Sumn. R. 245, and the authorities there cited in notes, 6 Cruise Ch. 9, Tit. 37, Devise pl. 6, p. 158; Sheph. Touch. by Preston, 87 [14 Law Library, N. S.])

(d.) A construction which will give force and effect to every word will be preferred to one which will render some of the words inoperative. (2 Pow. on Dev., by Jarm. 8, rule XIV., 5 Law Lib. N. S.; *Morrall v. Sutton*, 1 Phill. Ch. R. 536, 537.) In *Dover v. Gregory*, (10 Sim. R. 399.)

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Sir L. SHADWELL, V. C., said: "The court in construing a will is bound to give a meaning to every word if it can, and not to reject any word as being a surplusage if it can be avoided."

(e.) The construction of a will should be favorable and reasonable. (2 Black. Com. 379, 381; Broom's Max. 238; *Doe dem. Haw v. Earles*, 15 Mees. and Wels. 454; *Loveless on Wills*, 274, 9 Law Lib. N. S.; *Parsons on Wills*, 32, 70 Law Lib. N. S.; 2 *Williams on Executors*, 931.)

(f.) The court will presume against a partial intestacy; and a construction which will prevent it will be preferred to one which will permit it. (*Ward on Leg.* 11, 12; *Booth v. Booth*, 4 Ves. R. 407; *Morrall v. Sutton*, 1 Phill. Ch. R. 537; *Stehman v. Stehman*, 1 Watts' R. 466, 475; *Reeves v. Reeves*, 1 Dev. Ch. R. 386, 388.)

2. The testatrix devised the share in question to her nephew, Daniel B. Dash, and his heirs. She made devises in a similar form to other nephews and neices, and to her two surviving sisters. She evidently intended to benefit his numerous family, and to make an equitable and equal division of property among her sisters and the issue of her deceased brother and sisters. It is manifest that she designed to make a division of this property among these collateral relatives *per stirpes*, appropriating to each separate stock an equal share. Her object plainly was not to give it to particular individuals or personal favorites, but to leave it in the manner which the law deems equal and just. (1 R. S. 752, §§ 8, 9.) Daniel B. Dash and her two sisters died after the will was made. She made no alteration of the will; which fact is inexplicable if she had believed that the shares designed for them would lapse, and that as to this property, she would die intestate; but which is perfectly intelligible if she supposed it would go to their families. If it should be construed as a mere lapsed devise, their families and descendants will lose all the benefits of this provision of the will; there will be an intestacy as to their shares, and an unequal and inequitable

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distribution of her property, contrary to her undoubted and manifest purpose and wishes.

3. A construction producing a more equitable result will be more reasonable and favorable, and has been properly adopted by the court at special term.

(a.) If the devise had been in form, "to Daniel B. Dash or such persons as shall upon his decease be his heirs," or if it had been to "Daniel B. Dash or his heirs," it would have been a good devise to his heirs, if he had died during the life of the testatrix. (*Gettling v. McDermott*, 2 My. & K. 69; 4 Edw. Ch. R. 665.) But if the word "and" be construed as synonymous with the word "or," which (as shown before), has often been done, the clause will have the same effect. And by such a construction the words "and his heirs" will have some effect and operation; whereas by a different construction they will have no effect at all, as the words "heirs" would, in such a case, be superfluous and useless. It is true that in the case of *Brett v. Rigden* (1 Plowd. R. 345), (which is the leading case in support of the doctrine of lapsed devises), it is said that the heirs are not named to take immediately, but only to express the quantity of estate which the designated devisee would have. But when the reason for this decision is examined, it will appear that the decision is not an authority against the defendants in this case, but the reverse. The reason expressly assigned is, that "the devisor could not properly make an estate of fee simple in the devisee without mentioning his heirs." As this reason for the rule has ceased to exist, the rule must cease also. The foundation on which it rested is gone, and it must, therefore, fail: *cessante ratione cessat lex*. It is implied in the decision that if the devisor could properly make an estate in fee simple in the devisee without mentioning the heirs, the words might, in case of the death of the devisee in the devisor's lifetime, operate so as to prevent a lapse and to make the devise take effect in the heirs of the devisee. But it has been shown that the words "and heirs" are

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unnecessary to create a fee simple (1 R. S. 748, § 1), and are therefore altogether superfluous and inoperative, if construed as words of limitation merely. To give them effect, they should be construed as intended, to operate by way of substitution or alternative. Otherwise, they will have no effect. But it is a rule to adopt such a construction, if possible, as will give effect to every word. *Supra*, p. 14, sub. 4. This will harmonize with another maxim of law: *Nemo est hæres viventis*. (Danv. Abr. 84, pl. 13.) As long as Daniel B. Dash was living, no one was his heir; on his death, certain persons, *eo instanti*, became his heirs. It would operate, therefore, as a devise to Daniel B. Dash solely, if living at the testator's death, for no one at that time could be his heirs; but if he should then be dead, it would vest the entire estate in his heirs; for, as to him (then being dead), it would be void. (2 Black. Com. 107, 170.) This consideration supports and gives effect to this devise. By this construction the words "and heirs" will operate as a provision against a lapse, to take effect only in the event of the death of Daniel B. Dash in the devisor's lifetime, (*Hawn v. Banks*, 4 Edw. Ch. R. 664.) For the construction of words otherwise inoperative, as provisional or substitutionary, to guard against a lapse, authorities, entitled to respect, are not wanting. (See *Doe d. Lifford v. Sparrow*, 13 East R. 359; *Gittings v. McDermott*, 2 My. & K. 69, 73; 2 Roper on Leg. [last ed.] 1413; *Girdlestone v. Doe*, 2 Sim. R. 225; *Jones v. Torin*, 6 Sim. R. 255; *Turner v. Moore*, 6 Ves. R. 557; *Horne v. May*, 2 Danv. Abr. 35 pl. 14; and see *Northey v. Burbage*, Prec. in Chan. 471; *Willing v. Baines*, 3 Peere Williams, 113; *Humphreys v. Howes*, 1 Russ. & My. 639; *Walker v. Main*, 1 Jac. & Walk. 1; *Mackinnon v. Peach*, 2 Keen's R. 555.)

(b.) If the testatrix had made this will after the death of Daniel B. Dash, the clause would have been construed as a devise to his heirs. This would have been a favorable and reasonable construction, and would have been in accordance with the emphatic opinion of Chief Justice

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POPHAM, a very able judge, (1 B. & P. 610; 3 Ves. R. 674; 6 Co. R. 75; Cro. Jac. 166), in the case of *Fuller v. Fuller* (Cro. Eliz. 423-424.) But, as a will of real estate, under the revised statutes, should be construed, as speaking, (that is, as having been executed,) at the time of the testator's death, the same effect should be given to it as if it had been executed at that time. (*Doe d. York v. Walker*, 12 Mees. & Wels. R. 600.) Especially in a case like this, where the testatrix intended it to have such an effect, as is evident from her having made the devise, in express terms, of all the property of which she should die possessed. According to this construction, the heirs of Daniel B. Dash took, as devisees, under the clause of the will under consideration.

(c.) By either of these constructions a partial intestacy, which would otherwise be produced, will be avoided, and the general intention of the testatrix will be carried out; and although it may not be in the very way she designated, the great object which she had in view will be accomplished, and an effect alike reasonable and equitable be given to a provision which otherwise, contrary, undoubtedly, to her intention, will be entirely inoperative.

III. If none of these views are correct, it must be considered whether the court can uphold and carry into effect the other portions of the residuary devise, after such great changes have been caused by death, subsequent to the date of the will.

1. The will contemplated an equal division of the property among her sisters and the descendants of her deceased brother and sisters *per stirpes*. That the testatrix had a plan in devising this remainder is evident; and it is evident, also, what that plan was. It was not to devise it according to a predilection for particular persons, but to divide it among her sisters and the children of her deceased brother and sisters, *per stirpes*, to give it for the benefit of their respective families, according to this fair and reasonable rule. This was the plan which the deviser had formed

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for the distribution of the property; of this there can be no doubt. Events occurring after the will was made, have frustrated this just and equal plan, and nullified a part of the devise. To give effect to the other part of it, would be directly contrary to the manifest plan and purpose of the testatrix, and would be inequitable, unreasonable and unjust. It is to be presumed that it could not have been the devisor's intention that such a great and vital change in her deliberate and plainly expressed plan should be carried out; and, therefore, in conformity with decisions in similar and analogous cases (*Coster v. Lorillard*, 14 Wend. 265, 349; *Hawley v. James*, 16 Wend. 61; *Root v. Stuyvesant*, 18 Wend. R. 257, 317, 318; *McSorely v. Wilson*, 4 Sand. C. R. 515; *Harris v. Clark*, 3 Seld. R. 242; *Amory v. Lord*, 5 Seld. R. 403), the whole residuary devise in fee should be set aside, and the property be left to the operation of the law of descent, especially as the very plan and purpose of the testatrix will be carried out in this way, although it is a different way from that which she had anticipated.

2. The fact that the judgment of the court at special term was based upon a different ground from the one last mentioned is unimportant. The question is whether that judgment was right, not whether the reasons of the court were right. If they were erroneous, yet, if the judgment was not erroneous, it should not be reversed. The judgment was that the parties were entitled severally to certain specified shares. If they were severally entitled to these respective shares, the judgment was not erroneous, but was the very judgment which should have been given, although their right and title might depend upon a different principle or rule of law from that on which the court relied. In such a case, although the court erred in its reasons, yet it came to the right conclusion. The judgment, therefore, was not erroneous, and it should be affirmed, and that of the general term should be reversed. (*Fenton v. Reed*, 4 J. R. 53; *Curtis v. Hubbard*, 1 Hill R.

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336; *Hanford v. Artcher*, 4 Hill R. 276; *The Merchants' Bank v. Spalding*, 5 Seld. R. 61; *Magie v. Baker*, 14 N. Y. Rep. 438; *Titus v. Orvis*, 16 N. Y. Rep. 618; *Davis v. Packard*, 7 Pet. R. 282; *Shepherd v. Nabor*, 6 Ala. Rep. 631, 638; *Major v. Germantown Railroad*, 3 W. & S. 91; *Clark v. Boyd*, 6 T. B. Monr. 295; *Ormsby v. Hunton*, 3 Bibb. R. 299; *Sanders v. Johnson*, 1 Bibb. R. 322; 1 Str. R. 371; *Smith v. Dobson*, 3 Mann & Gr. R. 62.)

B. W. Bonney & E. S. Van Winkle, for the respondents.

I. The testatrix, Hannah Bowie, left no child or lineal descendant her surviving; the devises in question were to her sisters, nephew and niece, who are usually called "relatives," "collateral relatives," and "next of kin." (1 R. S. p. 752, sec. 7; 2 R. S. p. 97, sec. 75.)

II. Before the revised statutes of 1830, it was well settled law, in New York and elsewhere, that all devises of real estate lapsed, in case of the death of the devisee named in the will during the life time of the testator. (*Mowatt v. Carow*, 7 Paige, 328; *Bishop v. Bishop*, 4 Hill, 138; *Denn v. Bagshaw*, 6 Term R. 518.)

III. By the enactment now in question, the legislature has changed the previously settled rule of law in those cases only where the devisee named in the will was a child, grandchild, or other issue of the testator, and died before the testator's decease, leaving a child, grandchild, or other issue who survived the testator.

1. The words of a statute are to be taken in their ordinary and familiar signification and import; and regard is to be had to their general and popular use, for, "*Jus et norma loquendi*" is governed by usage, &c. (2 Dwarrris on Statutes, 702; 9 Law Library, 47; *McCluskey v. Cromwell*, 11 N. Y. R. 593, 601.)

2. "Descendant," in ordinary and familiar usage, always means the children, grand-children, or other issue of an ancestor. "Any person proceeding from an ancestor:

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issue, offspring in the line of generation *ad infinitum*." (Webster's Dictionary.) "The offspring of an ancestor." (id.)

3. Legal lexicographers give to the word the same definition. "'Descendant,' one who descends or is descended from another. A relative in the descending line—the opposite of ascendant. 'Descendants' is a good term of description in a will, and includes all who proceed from the body of the person named." (Burrill's Law Dict'y.) "'Descendants' are the posterity, those who have issued from an individual; and include his children, grandchildren, and their children to the remotest degree. The descendants from what is called the direct descending line. See 'line.'" (Bouvier's Law Dictionary.)

4. By commentators and other law writers, the term "descendants" is used as synonymous with "issue." (4 Kent's Com., lecture 65, 373, *passim*.) "If the owner of lands dies without lawful descendants, leaving parents, the inheritance shall ascend to them." (Id. 392–3.) "If no parents, the brothers and sisters or their descendants take the whole." (Id. 294.) "A gift to descendants receives a construction answering to the obvious sense of the term, namely, as comprising issue of every degree." (2 Jarman on Wills [Perkins' edition], 32.) "'Descendants' is a good term of description, and includes all those who proceed from the body of the person named, as for instance 'grandchildren.'" (2 Hilliard on Real Property, 573.) "The word issue embraces both children and grandchildren, whether born before or after the making of the will." (Id. 572.) "'Descendants:' under this description is comprised every individual proceeding from the stock or family referred to by the testator." (2 Williams on Executors, 1000.) "When the description 'issue' is employed in a will as a word of purchase, it will, in its ordinary import, comprise all those who can claim as descendants from or through the person to whose issue the bequest is made; that is, grandchildren and great grandchildren, as well as

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children." (Id. 999.) "'Legacies to descendants.' The natural import of the term is sufficient to include every individual proceeding from the stock or family referred to by the testator, so that a legacy to 'the descendants of B.' will comprehend all his children, grandchildren," &c. (1 Roper on Legacies, ch. 2, § 9, 136.)

5. In judicial decisions, also, "descendants" has been uniformly used as having the same signification as "issue." "When used as a word of purchase, it (issue) has always been considered as synonymous to and the same as 'descendants;' and whoever can make himself out a descendant of the person to whose issue the bequest is made, has a right to be considered as *persona designata* in that bequest. The word (issue), therefore, embraces all the 'descendants.'" (*Davenport v. Hanbury*, 3 Vesey, 257.) By counsel *arguendo*: Issue is "*nomen collectivum*," comprehending all descendants. (*Freeman v. Parsley*, 3 Vesey, 421.) Legacy to the "descendants of A and B equally," held that all descendants (children and grandchildren) take *per capita*. (*Butler v. Stratton*, 3 Brown C. C. 367.) "Devise of real estate in reversion so as all the descendants of the said S. T. should together be entitled only to one moiety of the said premises, and all the descendants of the said A. L. should together be entitled to no more than the other moiety thereof; and that none of such descendants, either of S. T. or A. L., should be entitled to any greater or other share of the said respective moieties of the said respective premises than his, her, or their father or mother would have been entitled to if living." (*Legard v. Haworth*, 1 East, 120.) Held that the grandchildren of S. T. and A. L., though in *esse* at the date of the will, can only take *per stirpes*, &c. (See Opinions of Justices, 129-30, and Arguments of Counsel, 124, 128.) Master of the rolls: "It is clearly settled that the word 'issue,' unconfined by any indication of intention, includes all 'descendants.'" (*Leigh v. Norbury*, 13 Vesey, 340.) "Devise to the descendants of Francis Ince, now living in and about Seven Oaks, in Kent,

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or hereafter living anywhere else:" Master of the rolls: "The word 'descendants' means all those who proceeded from his body, and therefore both the grandchildren of Francis Ince are entitled." (*Crossly v. Clare*, Ambler, 397.) By the will of John Garnett, Peter Pierson was requested, in case he should die without issue living at his death, to dispose of certain property "to and among the descendants of my late aunt Ann Coppinger, his grandmother." Held that the words were imperative, and created a trust in favor of the descendants of Ann Coppinger. (*Pierson v. Garnett*, 2 Brown C. C. 38.) The chancellor affirmed the decision of the master of the rolls, saying: "If the word used had been 'relatives,' it would go to those within the statute of distributions, but under these words it will go only to such relations as are 'descendants,' which is still more limited." (S. C., 2 B. C. C. 226, 230.)

6. In the revised statutes the term "descendant" or "descendants" is invariably used in the sense of "issue" or lineal descendants or descendant. (1 R. S. p. 751, sections 1 to 15 inclusive; 2 R. S. p. 96, sections 72 to 75 inclusive.) In connection with the sections of the revised statutes above mentioned, we read the section now in question—2 R. S. p. 66, section 52—and respectfully insist that the words "child or other descendant of the testator," as there used clearly mean and were intended to mean a "child or other lineal descendant, or issue of the testator."

7. In all the cases decided in this state since the revised statutes went into effect (except in this case at special term), the same definition has been given to the word "descendants," for which we now contend. "A legacy to a sister's child is not a legacy to a descendant of the testator. By a descendant is not meant any relative, to whom, in some possible contingency, property might descend, but lineal descendants, issue of the body." (*Armstrong v. Moran*, 1 Brad. Surr. R. 314.) "The term descendants properly includes every person descended from the stock referred to. The word issue is co-extensive with descendants, and

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includes every degree." (*Barstow and Goodwin*, 2 Brad. Surr. R. 413.)

IV. No argument in favor of the construction for which the appellants contend, can be legitimately drawn from the use of the word "descent" in the statute. That word was first used as signifying "succession by law to an estate in lands," or "the title by which a man on the death of his ancestor acquires his estate by right of representation as his heir at law," at a time when, under the feudal system then prevailing, none could take title to lands by succession, except such as were the issue or lineal descendants of the first feudatory; and in default of such issue, the lands escheated to the feudal lord. (2 Black. Com. 200, &c.) And the same word has continued to be used in the same sense, as expressing the kind of title by which land is acquired, although the class of persons who may take land by that title, has been, from time to time, enlarged, until it has come to include parents, and collateral relatives, as well as children or other issue of the owner who died intestate. But the word "descendant" or "descendants" has never, either in legal phraseology, or in common parlance, been used as a generic term to designate all such persons as do or may take land by descent. "Descendant" has been and is always used in an active sense, as designating a person moving, descending or proceeding from another person, and never in a passive sense, as meaning the recipient of something which descends, or comes to him by descent. "Descendee" might, perhaps, properly designate such a recipient.

V. It was the intent of the legislature, by the statute in question, to give to the issue of any child or grand-child of a testator, who had died before the decease of such testator, the same right and interest to and in property devised or bequeathed to such child or grand-child, which said issue would have had to the portion of the estate of the decedent which such child or grand-child, if living, would have inherited or taken by descent, in case said decedent had

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died intestate; and this intent is fully effected by giving to the word "descendant," as used in the statute, its popular as well as legal signification of "issue."

INGRAHAM, J. The main ground upon which the appellants rest their appeal, is that by the statute the devisees to those devisees who died before the testatrix, did not lapse, but that the estate so devised, vested in the children or other heirs at law of the devisee, in the same manner, and to the same extent as if such devisee had survived the testatrix.

By the statute (3 R. S. 5th ed. p. 146, § 4) it is enacted: "Whenever any estate, real or personal, shall be devised to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

The decision of the questions raised, depends entirely on the question, what was meant by the legislature in using the word descendants in this section. The same word is used in both clauses of the section, and the same interpretation must be given to it. If the sisters, and nephews and nieces of the testatrix can be considered as descendants, then the statute would operate, and the estate would pass in like manner to their children or collateral relatives; but if they are not descendants within the meaning of the term as so used, then the statute does not apply.

There can be no doubt but that prior to the passage of this statute these devises would have lapsed, in consequence of the death of the devisee before the testatrix; nor did it alter the rule that the devise was made to the devisee and his heirs. (*Page v. Page*, 2 Stra. 820; *Mowatt v. Carow*, 7 Paige, 328; *Bishop v. Bishop*, 4 Hill, 138.)

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And this rule still remains in force, unless it be held that brothers and sisters, and nephews and nieces are descendants of the testatrix.

The meaning of the word "descendant," as given by Webster is, "any person proceeding from an ancestor in any degree, issue, offspring in the line of generation."

The use of the word descendants in a devise has received the limited construction which confines it to issue. In *Cropley v. Clare* (Amb. 207), a devise of real estate to the descendants of A, &c., was held to apply to those who proceeded from the testator's body. In *Legarh v. Haworth* (1 East, 120), the word descendants was confined to children and grandchildren.

In *Haydon v. Willshire* (3 Durn. & East, 372), the word issue is held to be co-extensive with descendants. (2 Hiliard on Real Property, 573; *Davenport v. Hanbury*, 3 Vesey, 257; *Leigh v. Norbury*, 13 Ves. 340.) No case has been cited to us, nor have I been able to find any, where a devise to descendants has ever been construed as meaning any more than issue or lineal descendants. But all the cases confine the term to issue of the body. Nor is there any use of the word in the revised statutes that will admit of any other construction. Thus in the chapter of descents (1 R. S. 751), land descends to the lineal descendants, and afterwards to collateral relatives. So in the third and fourth sections, land descends to the children living, and descendants of such children as shall have died. In the third section it is provided if the intestate dies without descendants, then the inheritance shall go to the father. The sixth section provides that if there is no brother or sister, and no descendants of a brother or sister, the inheritance shall descend to the mother. So in section fourteen of 1 R. S. p. 735. In the case of illegitimate persons dying without descendants, the estate descends to the mother. In all these cases, and wherever else the word is used in connection with title to real estate, I think it is apparent that the legislature meant to confine the

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term "descendants" to the issue, and not to extend it to collateral relatives.

But we are urged, even if the construction contended for by the appellants be not admissible, to extend the statute to this case because it is within the equity of the statute, if not within its meaning.

It does not appear to me that we are warranted to adopt such a rule in a case of this kind. The law, until the passage of the act relied on, was the other way. The legislature altered it so far as to give to the issue of a devisee the estate which such devisee would have taken if he or she had survived the testatrix. So far it was an equitable provision. But I do not see any propriety in extending the rule to collateral relatives in whom the testatrix might have no interest, and to whom she might not have been related. To extend that provision to collateral relatives would not certainly carry out the intent of the testatrix. It was given to the devisees to benefit them, but the court has no right to presume that the same cause would have induced the testator to bestow her estate on distant collateral branches of the family.

It is also urged, on the part of the appellants, that the devise being to the devisees and their heirs, the title should pass notwithstanding the death of the devisee. Such a form of devise was necessary, before the revised statutes, to express the intent to give a fee, and the same form is used now, in many instances, to avoid doubt as to the intent of the testator. The mere fact that other words may be used to show such intent, is no reason why any other interpretation should be given in the use of such words now, from what they received formerly.

The law, as it existed previously, did not pass any estate to the heirs of the devisee where he died before the testator, and the use of the same words should not have any such effect, although they may be unnecessary to pass a fee to the devisee if he had lived.

Nor is it at all clear that it would be carrying out the

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intent of the testatrix to adopt the views of the appellants. It probably would be in the case of those devisees, who died leaving issue, but there is nothing from which we can conclude that the testatrix would have given her property to the collateral relatives. There is no propriety in adopting a conclusion of this kind, because it would be more equitable, when it is plain from the will and the statute that neither in terms authorizes such a construction.

In regard to the residue of the will, there is no ground for interfering with it because one or two specific devisees have failed. The others are perfect in themselves, and the devisees are entitled to their shares. This is not a case in which the plan of the whole will is affected by the failure of one or more to take the portion devised to them. Any such rule would subvert every will, if for any cause a devise of part is bad.

I am for affirming the judgment of the supreme court.

DENIO, Ch. J. The judgment in this case will depend mainly upon the construction to be given to the statute for preventing lapses of devises and legacies in certain cases. The provision is that "whenever any estate, real or personal, shall be devised or bequeathed to a *child or other descendant* of the testator, and such legatee or devisee shall die during the life time of the testator, leaving a *child or other descendant* who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the *surviving child or other descendant* of the legatee or devisee, as if such legatee or devisee had survived the testator, and had died intestate." (R. S. part 2, chap. 6, title 1, art. 3, § 52.) The testatrix, with whose will we are dealing, devised her real estate to a niece for life, and gave the remainder, in five shares: to two surviving sisters, one share each; to two nephews, the children of a deceased sister, one share; to a nephew and niece, the children of a deceased brother, one

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share; and to a niece, the child of another deceased sister, one share, to hold to them and their heirs and assigns forever. The testatrix lived several years after executing her will, surviving the devisees of three of the shares, and leaving her surviving the devisees of two of the shares. Certain of the devisees who died in the life time of the testatrix left issue. These devisees, if they had survived the testatrix, would have taken, under the will, two shares in the remainder. The other of the devisees, who predeceased the testatrix, and to whom a whole share was given, died without issue. The devisee for life survived the testatrix about fifteen years, and this action, which was for a partition, was brought soon after the termination of that life estate. Numerous changes, by death and by alienation, had in the mean time taken place among the devisees and their issue, and among those who would have inherited upon an intestacy of any part of the premises. When it shall be determined whether the devises to those who died before the testatrix lapsed or not, it will be easy to adjust the rights of the several parties in the premises, upon the facts ascertained by the supreme court. The judgments already given adjust, it is supposed, the respective interests accurately, upon the respective theories of the law upon which they are based. The question is whether these shares lapsed, or devolved upon the issue of the devisees by force of the act. The statute assumes that, but for its provisions, the devises in such a case would have lapsed; and such was the well settled doctrine of the common law. (*Brett v. Rigden*, Plowd. 340, 345; *Mowatt v. Carow*, 7 Paige, 328; *Bishop v. Bishop*, 4 Hill, 138.) This rule of the common law the legislature sought to change to a certain extent, but not wholly to abolish. It was not every devise or legacy which was to be preserved from lapsing where the beneficiary died before the testator, but only such as should be made to a child or other descendant of the testator, and gifts to such persons were not to be universally saved from lapse, but only where the bene-

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ficiary named in the will had left a child or other descendant surviving the testator. And even then the subject was not to devolve upon any one who could make title under the beneficiary named, but it was to vest in such child or other descendants as upon an intestacy of the devisee. The devisees in this case not being children of the testatrix, but her collateral relatives, the inquiry is whether such collateral relatives are, in the sense of this enactment, her descendants. It cannot for a moment be maintained that according to the common use of the word descendants, it is not limited to such persons as proceed mediately or immediately from the body of the person of whom it is predicated, in the course of generation. Descendants, when used either in written or spoken language, when unconnected with any qualifying word, describe the children, grand-children, &c. of the person named, and where that person is dead it embraces his posterity, however remote, but it is confined to them. Thus, we speak of the descendants of Abraham, of William the Conqueror, of George the Third, and of the first and second President Adams, of Jefferson and Alexander Hamilton; while we say of Queen Elizabeth, of William of Orange, of Washington and Madison, that they left no descendants, or, in the words of the statute, that they respectively died leaving no child or other descendant. These are common forms of speech, and the meaning is perfectly definite, and it is such as I have mentioned. The word is invariably employed in that sense, in books of history, in memoirs, in biographies, in works on genealogy, and in almost every book which treats of men and their affairs. I shall assume, therefore, that the legislature have made use of a word having in common parlance a definite meaning, which excludes nephews and nieces and other collateral kindred; and I have next to say that in construing statutes, words are generally to be understood in their natural and popular sense. There are, no doubt, exceptions to this rule, where it may be permitted to interpret words in the sense of a particular science or

branch of knowledge. In such cases language of a technical character is employed, and is frequently to be understood in a special sense.

The defendants' counsel relies upon this exception, and claims that as the statute in question relates to the transmission of the title of property upon the death of its owner, we are to construe the language in the sense of the law of successions. This seems very reasonable. The most authentic text of that law in this state, is in the statutes of descents and distributions; but there we find the word descendants employed in the ordinary and popular, and not in any artificial or scientific sense. The word descendants is used a great many times in the chapter of the revised statutes respecting the *title to real property by descent*, and always in the natural sense of lineal descendants. In several instances its meaning is in direct opposition to that attributed to it by the argument. For instance, the fifth section declares that in case the intestate shall die without lawful descendants, leaving a father, the inheritance shall go to the father. The sixth and seventh sections are devoted to prescribing the cases in which the inheritance shall descend to the father or mother, and to the brothers and sisters, or their descendants, and it commences by stating a condition common to all these cases, namely: "if the intestate shall die without descendants." In the last of these sections, the case in which there are no *descendants*, or any father or mother, is provided for by declaring that the inheritance shall descend to the *collateral relatives*. Here the expression, collateral relatives, is used in direct contrast to descendants. The statute of distributions is equally discriminating, and it uses the word descendants in the same sense. (2 R. S. 96, § 75.) In the third subdivision of the section, we find the direction, that if there be a brother or sister, nephew or niece, and no descendants or parent, the widow is to be entitled to a certain part, and the remainder is to be distributed to the brothers and sisters and their representatives. We discover in these provisions

no indication of the use of this important word in any artificial or technical sense. If we look into treatises and adjudged cases, we shall find the word steadily used in its primitive and popular sense. I will mention only a single treatise, and refer specially to one adjudged case, among a great number which I have examined; noting, however, where some others may be found. Jarman says: "A gift to descendants receives a construction answering to the obvious sense of the law, viz: as comprising *issue* of every degree." (Treatise on Wills, v. 2, p. 32.) And again: "The word *issue*, when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree." (Id. p. 33.) The allusion to the context or connection reminds me that, if the point were otherwise doubtful, the use of the word *child* in connection with descendants, would go far to point the meaning of the latter word. *Noscitur a sociis* is a maxim which applies in such cases. If it could be shown that the word descendants sometimes embraced collateral relatives, it would not be so here since it is associated with the word *child*. I think the language means child or other more remote offspring of the person named. The single case selected for reference is *Crosley v. Clare*. (Ambler, 397.) There was a testamentary gift of a remainder, in real and personal property, to "the descendants of Francis Ince, now living in and about Seven Oaks, in Kent, and hereafter living anywhere else." There was, it is true, no claim on behalf of collaterals, but the question was between children and grandchildren. Upon the argument of the defendants' counsel in the present case, the children only would have taken; for the position is, descendants mean those who would take by descent in case of intestacy. But the master of the rolls held that the grandchildren were entitled to participate. "It would be unjust," he said, in this case, "to confine it to the heirs at law, because the word descendants means all those who proceeded from his body;" and the descendants, though in different degrees, were adjudged to take *per*

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capita. (See, also, *Pierson v. Garnet*, 2 Bro. C. C. 38; S. C., pp. 226, 230; *Davenport v. Hanbury*, 3 Ves. 257; *Butler v. Stratton*, 3 Bro. C. C. 367; *Leigh v. Norbury*, 13 Ves. 340.) I have found no case in which collateral relatives have claimed under a devise or bequest to descendants; and I am inclined to think this the first occasion in which the position has been taken that they were included under that description. If we turn to the chapter of Blackstone's Commentaries, in which he treats of *title by descent*, we shall find the word *descendant* constantly used to denote the issue mediate and immediate of the person of whom those descendants are predicated, and never in a sense which would include collateral relatives. (Book 2, ch. 14, pp. 223, 224.) It is urged, on behalf of the defendants, that the books habitually speak of the *descent* of real estate to the collateral heirs of the person dying seised; and it is claimed that the persons on whom the descent is cast must be descendants. This, I think, involves a fallacy. We use the word descent to describe the transmission of title from the deceased person to his heirs. The expression is figurative, and alludes, as Lord COKE supposes, to the principle of gravitation. (1 Inst. 11.) But the word descendants has reference to genealogy, or the succession of persons in the family relation, and has no necessary connection with the laws of inheritance. Land descends, in certain cases, from a son to his father, and from a man to his brother, but this does not prove that the father is the descendant of his son, or the brother of his brother, in any possible sense. It is correctly said that the law books and other writings commonly speak of *lineal* descendants; and it is argued that this would be improper if there were not another species of descendants; from which it is inferred that there are collateral descendants. But we rarely meet with this latter expression. The truth is that the word lineal in that connection is a pleonasm employed to emphasize the expression, and not, in general, to distinguish it from any other species of descendants; and so where *collateral*

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descendants are spoken of, an elipsis is made use of—the phrase meaning the descendants of collaterals. But it is further urged that if the devisees in this will are not within the words of the statute, they are within its intention, and that the act being remedial, they ought to be extended by an equitable construction, so as to meet the case of the defendants. But this is a statute in derogation of the common law, and its operation ought not to be enlarged beyond the fair natural meaning of the language. The former law was that where a devisee or legatee died in the lifetime of the testator, the gift lapsed, that is, became void. The legislature, it is certain, did not intend wholly to abolish this rule, so that the heirs of the devisee should in all cases take as though he had survived the testator, but only to change it to a certain extent, and under certain special circumstances. The case in which the new rule was to apply, was specially pointed out. It was where property should be devised to a child or other descendant of the testator. Where that circumstance did not present itself, the former rule was not changed. Courts have no right to say, if they could fairly do so, that the motive for the change would be equally strong if the devise were to a collateral relative. The legislature were the judges of that, and they have limited it to a devise to a descendant, and we can go no further than they have gone. If we should do so, other judges upon the same reasoning, might take another step, and hold that a devise to a stranger would be equally within the mischief. But I think that independently of the strict words of the statute, there is good reason to believe that the legislature did not intend to go, and would not have been induced to go beyond the provision they have made. There is a natural affection for one's own offspring, both mediate and immediate, beyond that which is felt for other relations, which the legislature thought proper to indulge to the extent mentioned in the statute. And there was good reason for the limitation of the rule; for otherwise, the gift might

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take a direction totally repugnant to the testator's wishes and affections. For example, should I devise an estate to a nephew, the son of my sister, and should he die, leaving no nearer kindred than a paternal uncle, or the issue of such an uncle, the estate, immediately upon my death, would go to an utter stranger to my blood; for if the word descendant, where it first occurs in the statute, would be satisfied with a collateral relative, the second use of it in the same sentence would require the same construction. The statute is motived upon the natural wish which every person feels that his possessions should be enjoyed after his death, by some one who owes his being to him. That sentiment is strong and universal. It furnished the climax to the misery of Macbeth when he uttered the pathetic exclamation:

"Upon my head they placed a fruitless crown,
And put a barren sceptre in my hand,
Thence to be wrenched with an unlineal hand,
No son of mine succeeding."

If the possessor of property is so unfortunate as to have no posterity, the law, in the absence of a testament, distributes the estate amongst his collateral relatives according to its own sense of propriety. But it allows him to make his own selection by will. By the common law such selection became abortive, if the object of it died in his lifetime. That law, in ignorance of what would have been his wishes after that event happened, refused to interfere with the general laws of succession, and considered him to have died intestate to the extent of the interest so attempted to be given. But where the gift was to a child, grandchild, &c., who had died leaving issue, the statute under consideration yields a certain deference to the natural sentiments of affection for one's offspring, and makes the deceased devisee a new stock of descent, not to his heirs generally, but to the heirs of his body.

I am quite satisfied that the interpretation contended for by the defendants' counsel cannot be sustained.

It is urged, in the second place, that the devise may be considered, under the circumstances which have occurred, as made in favor of the heirs of the devisees. The gifts were to the devisees and their heirs. But those are words of limitation, inserted to show the extent of the interest devised, and are not words of purchase. The same point was taken in the case cited from Plowden, where lands had been in form devised to Henry Brett and his heirs forever, who died in the lifetime of the testator. The court answered the position as follows: "And as to the heirs being named in the gift, namely, to Henry Brett and to his heirs, for which reason it is alleged that they shall be contained and included in the intent of the devise, they said that the heirs are not named there to take immediately, but only to express the quality of estate which Henry should have." The principle of this case has been steadily followed in the English courts ever since.* (*Hodgson v. Ambrose*, Doug. 337; *Denn v. Bagshaw*, 6 Term, 512, and cases there cited.) The provision of the revised statutes allowing a fee to be conveyed without words of inheritance does not change the rule. It does not follow, that because such words may now be dispensed with, that where they are inserted their legal effect is different from what it would have been before the statute. They were never absolutely necessary in a will, provided that it otherwise appeared that the testator intended to devise an estate of inheritance, yet the cases referred to arose upon wills, where words of inheritance in fee or in tail were used. In *Maybank v. Brooks* (1 Brown's C. C. 841), a legacy was held to have lapsed on account of the death of the legatee in the lifetime of the testator, though the bequest ran to the legatee, his executors, or assigns, notwithstanding that the addition of these words was unnecessary. The argument of the defendants' counsel proves too much; for if the addition of words of inheritance, since they have become unnecessary, enables the heirs to take as purchasers, I do not see that any deed or will, running to the party and his heirs, would vest an

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estate in the heirs; but that would introduce inexplicable confusion into titles to land. Those words were either words of purchase or of limitation, at the time the will was executed, and their legal effect is not changed by the events which subsequently happened.

It is finally urged that if the judgment of the court should be adverse to the defendants upon the questions thus far considered, it ought to decree the will wholly void, and adjudge that the real estate attempted to be devised descended to the heirs at law of the deceased. It is quite possible that if the testatrix had foreseen that her devisees would have died in her lifetime, she would have named their issue as alternative devisees. But we can have no certainty of this. Perhaps she would have selected other persons for the object of her bounty. I have looked carefully into the several cases referred to in support of this last position, and find that in each of them there were provisions in the will under consideration which were void, for being in violation of some positive rule of law. (*Coster v. Lorillard*, 14 Wend. 265; *Hawley v. James*, 16 id. 61; *Root v. Stuyvesant*, 18 id. 257; *McSorley v. Wilson*, 4 Sand. Ch. R. 515; *Harris v. Clark*, 3 Seld. 242; *Amory v. Lord*, 5 id. 403.) The principle of these judgments seems to be that where the disposing scheme of the testator has been substantially defeated by the failure of the illegal provisions to take effect, the court will declare an intestacy as to the whole of the estate, or such parts of it as are inseparably connected with the void parts, though there are parts which standing alone would be valid. This result has not been reached without a severe struggle among the judges, as will be seen by the opinions delivered in the court of errors in *Root v. Stuyvesant*. But conceding the principle to be established to the extent which I have stated, it has no application to this case. Here no part of the will violated any rule of law. Simply, events occurred subsequently to the execution of the instrument and before the death of the testatrix, which defeated her intention as to three-fifths

of her estate, and she did not elect to make a new disposition as to these portions. Whether this was because she was content with the disposition which the law would make as to that part of the property; or the omission to make a new will arose out of accident or forgetfulness, we cannot say. We certainly know that she made valid gifts of two-fifths of her estate to devisees who survived her, and were therefore competent to take precisely according to her intentions. We cannot take from these devisees the property thus validly bestowed upon them. It would establish a dangerous precedent to set aside devises to one set of devisees, because those made in favor of another class have become inoperative by events transpiring after the execution of the will. I am satisfied that we have no right to do this.

I think the judgment appealed from ought to be affirmed.

All the judges concurred except DAVIES, J., who took no part in the decision. Judgment affirmed.

Abstract of case.

CHARLES H. FROST v. VALENTINE KOON and others.

A statement as to the origin of the debt, in a confession of judgment as follows: "1852, 1st December, money lent by the plaintiff to the defendant to aid in purchasing lot in Forty-seventh street, New York, to the amount of \$200. 1853, 1st August, a balance was due to the plaintiff by defendant, on the purchase of Eighth Avenue lot, to \$800. 1854, 1st May, money was lent by plaintiff to defendant to aid in purchasing lots on Ninth avenue to \$300. And cash was lent by plaintiff to defendant at different times since above, to \$175—\$1,475, which sum of \$1,475 is now due by the defendant to the plaintiff, the interest on said sums having been paid till the date hereof." *Held*, to be sufficiently minute; unless it was in regard to the last item, which related to cash lent; and that as to that, it could also be supported within the spirit of the decisions. But if not, that the insufficiency of that item could not have the effect of destroying the whole judgment.

Where a prior incumbrancer by judgment, on being made a party to a foreclosure suit, under an allegation in the complaint, charging him as having an interest in the premises subsequent to the mortgage, makes no defense to the foreclosure, but allows judgment to be taken against him by default, and the surplus moneys to be distributed to other claimants, this is not equivalent to an admission by him upon the record, that he has no lien upon the premises older than, or superior to that of the mortgage, so as to be an absolute *estoppel* upon him (or a purchaser under his judgment), in another action brought by a different plaintiff for the foreclosure of a distinct and prior mortgage, and prevent him from asserting in the latter suit a legal priority to the surplus moneys to which he is apparently entitled by virtue of his judgment; the parties to the record not being the same, nor the subject of controversy identical.

Nor will such incumbrancer (or his assignee), be estopped from claiming the surplus moneys in the second foreclosure suit, by his standing by at the sale in that suit, and suffering the property to be sold to another person, under a public announcement by the sheriff, that there are no other liens upon the premises than those stated (among which that of the judgment under which such incumbrancer claims is not included); where the purchaser is fully apprised of such incumbrancer's rights, and that they will be insisted on.

Where a judgment creditor of a mortgagor releases from the operation of his judgment, certain premises which are bound thereby, this should not prejudice him (or his assignee), in a contest respecting the surplus moneys arising from a sale of mortgaged premises in a foreclosure suit, beyond the proportionate part of the judgment which the released premises, in connection with the mortgagor's other real estate, ought to pay.

Where a purchaser claims surplus moneys in a foreclosure suit, on the ground

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that a prior judgment upon which the mortgaged premises were sold, was not a valid lien upon the lands, and it appears that he did not interfere to prevent the sale by injunction, or the consummation of the title by deed, or the delivery of possession thereunder to the purchaser at the sale under the judgment, he will be held to have been guilty of so much *laches* in the assertion of his rights, that he ought not to be permitted to enforce them against such surplus moneys.

THIS is an appeal, by the executors of Thomas Southard, originally one of the defendants, from an order of the supreme court, in the first district, disposing of certain surplus moneys in this action arising upon the foreclosure of a mortgage and a sale of the mortgaged premises, and awarding said surplus moneys to the defendant Koon, as between him and Thomas Southard, who were rival claimants thereof.

The facts of the case are as follows: The surplus in controversy arose upon a foreclosure of a mortgage given by Robert Gilmore to one Andrew Quackenbush, on the 20th May, 1854, for \$1,250, upon a lot on the Eighth avenue, in the city of New York, and subsequently assigned to Frost, and foreclosed by him in this action. The property was sold under the judgment of foreclosure, on the 6th of May, 1859, and was purchased by Valentine Koon, the present respondent, for \$5,925. After paying prior liens and the costs of foreclosure, there remained a surplus of \$2,191.86, which is claimed by Koon and Thomas Southard. In the supreme court it was awarded to Koon, and Southard having died pending the proceedings, his executors appealed to this court.

Both parties claim through Gilmore, who was the owner of the premises in 1854 and subsequently thereto. The claim of Koon to the surplus rests upon the following facts: Gilmore, being the owner of the lot on Eighth avenue and other property, and indebted to one John Van Wagner, confessed to him a judgment for \$1,475, which was filed and docketed in New York on the 29th day of December, 1854. An execution on the judgment was issued to the sheriff of New York on the 30th of March, 1857, and under

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it the lot on the Eighth avenue was advertised and sold on the 18th of June, 1857; and on that sale Koon became the purchaser for \$1,700. He received the usual certificate of sale, and at the expiration of fifteen months, and on the 14th of September, 1858, the sheriff conveyed to him the property, and he went into possession. This lot was at the time of sale encumbered by a prior mortgage of \$2,000, dated 13th of May, 1854, to Garret Myer; and the one of \$1,250, before mentioned, to Quackenbush, assigned to the plaintiff, upon which was the foreclosure on which the surplus in controversy arises. Koon, therefore, claimed under the lien of a judgment docketed on the 29th day of December, 1854.

The claim of Southard rests upon the following facts: On the 4th of May, 1855, Gilmore gave to one George W. Platt, a mortgage upon the Eighth avenue lot to secure the payment of \$700, and on the 29th day of May, 1855, he gave to Southard a mortgage upon the same premises for \$1,200. In March, 1856, Platt commenced a suit for the foreclosure of his mortgage, in which suit Southard and John Van Wagner were made defendants; and the complaint alleged that they had an interest in the premises, which had accrued subsequent to the lien of the Platt mortgage. In this suit Southard and Van Wagner made no defence, and Van Wagner consented that the usual order of foreclosure and sale should be entered, and the usual judgment of foreclosure was entered, and the premises sold under it, subject to the aforesaid mortgages to Myer and Quackenbush, to Southard on the 21st of October, 1856, and a conveyance made by the sheriff of the premises to him on or before the 3d day of December, 1856. At this sale Van Wagner was present and bid, but gave no notice of any claim or incumbrance owned by him. The sheriff sold the property under the announcement that it was subject to the Myer and Quackenbush mortgages only. Southard paid the ten per cent required in cash, at the time of the sale, in ignorance of the Van Wagner judgment, but

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was apprised of that judgment and of the claim under it, before he paid the residue of the purchase money and completed his purchase, and took his deed. He went into possession in the spring of 1857. On this sale a surplus of \$1,054 arose, which was applied on the bond and mortgage which Gilmore had given to Southard on the same premises on the 29th of May, 1855, to secure \$1,200. Southard, therefore, claimed under a lien (that of Platt's mortgage), dating back to May 4, 1855, some four months subsequent to the date of the Van Wagner judgment under which Koon claimed.

As against the right of Koon, it is alleged by the executors of Southard, that the judgment in favor of Van Wagner, under which he purchased the equity of redemption, was void for a defective statement in the confession of the judgment which renders all proceedings under it invalid. This judgment was entered on the 29th of December, 1854 (and, if available from date, is prior to any right or lien of Southard), and was founded upon the following statement as to the origin of the debt: "1852, 1st December, money lent by the plaintiff to the defendant, to aid in purchasing lot in Forty-seventh street, New York, to the amount of \$200; 1853, 1st August, a balance was due to the plaintiff by the defendant on the purchase of Eighth avenue lot to \$800; 1854, 1st May, money was lent by the plaintiff to the defendant to aid in purchasing lots on Ninth avenue to \$300; and cash was lent by the plaintiff to the defendant at different times since above to \$175—\$1,475, which sum of \$1,475 is now due by the defendant to the plaintiff—the interest on said sums having been paid till the date hereof."

When the above judgment was entered up, Gilmore was the owner of three lots on the Ninth avenue, subject to various prior incumbrances, upon which Van Wagner's judgment was a lien, as well as upon the Eighth avenue lot, such prior incumbrances being five several mortgages, amounting, in the aggregate, to \$7,000. On the Ninth

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avenue lots Platt also had a mortgage for \$1,500, dated on the 13th and on the 14th of July, 1855, and in March, 1856, Platt commenced to foreclose it. Neither Southard nor Van Wagner were made parties to this foreclosure. A judgment was subsequently rendered and the Ninth avenue lots sold on the 21st of October, 1856, to Platt for \$4,400, and on that sale there was a surplus of \$2,267.53, which was paid into court. A reference was had as to this surplus, and Van Wagner, although not a party to the suit, set up a claim to the surplus, under his judgment, but his claim was rejected on the ground that the judgment being prior to the mortgage foreclosed, was not affected by the foreclosure, and was not a lien on the surplus.

On the 3d day of March, 1857, Van Wagner gave to Platt a general release of the Ninth avenue lots which was recorded on the 6th of May, 1857. At this time Van Wagner was aware that the Eighth avenue property was subject to the before-mentioned mortgages to Myer of \$2,000; to Quackenbush for \$1,250; and to another mortgage to Southard, of the 29th May, 1855, for \$1,200; for they are all recited in a mortgage executed by Gilmore to himself on the same (Eighth avenue) premises, for \$2,500, dated on the 7th of June, 1855. On this property there was a surplus of \$1,054.32, on the sale under Platt's mortgage, which was made subject to the mortgages of Myer and Quackenbush—a sum insufficient to pay the entire amount of the Southard mortgage. The sale of the Ninth avenue property (which was had at the same time as that of the Eighth avenue) under Platt's mortgage, was also made in the presence of Van Wagner. Platt became the purchaser at the price of \$4,400, subject to the five mortgages for \$7,000 above mentioned, yielding a surplus of \$2,267.53, being more than sufficient to pay the Van Wagner judgment. Southard also claims that there is evidence tending to show that the Van Wagner judgment was paid and satisfied, but as the referee has reported against him on the

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question of fact on that point, it is not deemed necessary to recapitulate the facts bearing on that part of the case. Upon these facts it was claimed, on the part of Southard, that he having become the purchaser of the Eighth avenue lot in 1856, perfected by deed on the 5th of May, 1857, under the Platt foreclosure, was so situated that he had the equitable right to compel the payment of the Van Wagner judgment out of the Ninth avenue property, and that this objection was properly urged on the reference as to the surplus as against the right of Koon, although no exception was taken at the time to the proceedings of Van Wagner for the sale of the Eighth avenue lot on the judgment under which Koon purchased for \$1,700, on the 13th of June, 1857, and for which he received a deed on the 14th of September, 1858. Southard also claimed that Van Wagner (and Koon as claiming through him), having been a party to Platt's foreclosure of his Eighth avenue mortgage, was estopped to claim these surplus moneys, by not having controverted the allegation in Platt's complaint that Van Wagner's incumbrance was subordinate to Platt's, and by having attended the sale under that foreclosure, and not having given notice of his claim when the sheriff announced there were no other incumbrances than those of Myer and Quackenbush, was estopped from claiming under his judgment at all. Southard further claimed that the Van Wagner judgment was satisfied and paid.

The foregoing are the leading facts upon which the question arises. Others, material to notice, are referred to in the opinions.

The referee, in the first instance, made a report in which he decided that Koon was not entitled to the surplus, for the reason that the Van Wagner judgment was void for a defective statement on confession. Upon this report an order was made, at special term, awarding the surplus to the executors of Southard. Koon appealed, and the general term reversed the order, and set aside the report, and referred the matter back to the referee, holding also that

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the referee erred in supposing he had a right to inquire into the validity of the Van Wagner judgment in this collateral way; further holding that neither of the parties were *bona fide* purchasers, and that even if a part of the judgment was discharged by the release of the Ninth avenue property, the whole was not.

The referee made a second report, awarding Koon the money. He held that the evidence showed that Koon knew before his purchase, either by information from Van Wagner, or otherwise, of Southard's \$1,200 mortgage—of his purchase of the Eighth avenue premises—of his possession under such purchase, and of his denial of the validity of the Van Wagner judgment; but that Koon and Southard each had knowledge of the facts constituting the title of the other; and that neither, though a purchaser for value paid at the time of the purchase, was in the sense of the law a *bona fide* purchaser without notice, nor entitled to the peculiar rights incident to persons in that situation. He further held that the Van Wagner judgment was not paid; that Van Wagner was not estopped by the foreclosure of Platt's mortgage from claiming under his judgment, inasmuch as he was a prior incumbrancer, and not, as charged in Platt's complaint, a subsequent incumbrancer; and inasmuch, also, as there was not any specific reference to his judgment in the pleadings or judgment entered upon the foreclosure; nor was he cut off by his release of the Ninth avenue property, farther than as to the proportional part of that judgment which the Ninth avenue property should have borne.

To this report the executors of Southard excepted. The case was heard at special term, and the report confirmed, and the order there made affirmed at the general term; the court holding that whatever might have been the equitable rule in regard to the effect of Van Wagner's release of the Ninth avenue premises, Southard had slept upon his rights, had permitted without objection, a sale of the Eighth avenue premises upon the Van Wagner execution, and

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suffered, without interference on his part, the purchaser at the sheriff's sale to obtain his deed, and afterwards possession under it, to his own exclusion from the property; that after suffering himself to be thus dispossessed, he could not maintain an action of ejectment to recover possession, nor obtain relief by motion, nor in a court of equity, as that court would on the facts found by the referee, consider him concluded by his own silence and neglect, from any relief. That his rights could not be regarded as superior on a claim to the surplus moneys to those which would have been presented in an action at law or in equity, and he must be treated as confessing the superior rights of Koon claiming under another and an adverse title. From the order of affirmance, Southard's executors appealed to this court.

Thomas Nelson, for Southard's executors (appellants).

John H. Reynolds, for Koon (respondent).

HOGBOOM, J. The controversy in this case is in regard to the surplus moneys arising upon the foreclosure of a mortgage, and the conflicting claimants are Valentine Koon and Thomas Southard. The mortgage foreclosed is one for \$1,250, executed by Robert Gilmore to Andrew Quackenbush, and subsequently assigned to the plaintiff Frost, upon premises situated on the Eighth avenue, in the city of New York. This mortgage was executed on the 20th day of May, 1854, and the premises were sold under it on the 6th day of May, 1859, and Koon became the purchaser.

Koon claimed the surplus moneys as having title to the premises at and previous to the time of the mortgage sale, under a sheriff's deed executed to him on the 14th day of September, 1858, as the purchaser at a sheriff's sale, made to him on the 13th day of June, 1857, upon a judgment by confession, given on the 29th day of December, 1854, by Robert Gilmore, the then owner of the premises, to

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John Van Wagner. The lien, therefore, under which Koon claims title to the surplus moneys dates back to the 29th day of December, 1854.

Southard claimed the surplus moneys as a mortgagee of the same premises under a mortgage from Robert Gilmore to him, executed on the 29th day of May, 1855; also, as a purchaser of the same premises on the 21st day of October, 1856, upon a mortgage foreclosure thereof, under a mortgage executed by Gilmore to George W. Platt on the 4th day of May, 1855. On this sale certain surplus moneys arose, a portion of which was paid to Southard as a subsequent mortgagee, but not enough to extinguish his claim as such. The lien, therefore, under which Southard and his executors claim title to the surplus moneys dates back to the 4th day of May, 1855—the date of the Platt mortgage.

This, it will be seen, is some four months subsequent to the lien of the Van Wagner judgment under which Koon claims; and, if there were no other circumstances in the case, would show a manifest priority of title on the part of Koon to the fund in controversy. This apparent priority is attempted to be overthrown by Southard in several ways.

1. It is contended that the Van Wagner judgment is invalid as against subsequent encumbrances on the property, by reason of a radically defective statement in the confession of judgment.

2. It is contended that Van Wagner and Koon are estopped from setting up any title to the surplus moneys by having been made parties to the foreclosure of the Platt mortgage under an allegation in the complaint which charged them as having or claiming an interest in the premises subsequent to that of the mortgage, making no defence to such foreclosure, and allowing judgment to be taken against them by default, and the surplus moneys to be distributed to other claimants; which is claimed to be equivalent to an admission by them upon the record that they had no lien upon said premises older or superior to that of the Platt mortgage.

3. It is contended that Koon's assignor, Van Wagner, (and consequently Koon), is further estopped from making such claim by Van Wagner's standing by at the sale under the Platt mortgage, and suffering the property to be sold at public auction and Southard to become the purchaser under a public announcement by the sheriff that there were no other liens upon the premises than those there stated (among which that of the Van Wagner judgment was not included.)

4. It is contended that Van Wagner—and if he, then Koon also—is precluded from making any claim to the surplus moneys, by reason of releasing from the operation of his judgment certain other premises situated on the Ninth avenue, which were bound thereby; also belonging to Gilmore, and sold under certain mortgages thereon, the surplus moneys upon which were properly applicable to the payment of this judgment; and, if applied thereto, would have left this fund arising from the sale of the Eighth avenue premises wholly applicable to Southard's claim.

5. It is contended that the Van Wagner judgment was paid and satisfied, and therefore not entitled to participate in the distribution of the surplus moneys. This last proposition it is unnecessary to discuss, as the referee who heard this cause has decided the question of fact arising thereon against Southard, upon sufficient evidence to justify his conclusion.

1. The Van Wagner judgment was not void. In conformity with repeated decisions of this court, it must be held that the specifications in the statement on which the judgment was founded were sufficiently minute, unless it be that relating to cash lent, and in regard to that, the statement is in substance that Gilmore was indebted to Van Wagner for cash lent at different times between the 1st of May, 1854, and the 29th of December, 1854, to the amount, in the aggregate, of \$175. I am inclined to think this also can be supported within the spirit of the decisions

above referred to. If not, it can not have the effect of destroying the whole judgment; at most it can be invalidated only to the extent of \$175.

2. It is possible that as against the mortgage of Platt on the Eighth avenue property, and in the suit for the foreclosure of that mortgage, and as to the surplus moneys thence arising, Van Wagner (and Koon as his assignee) would be *estopped* by the proceedings in that suit from asserting any title to the surplus moneys, as against Platt or Southard. But I do not think this fact, however admissible in evidence, would be an absolute estoppel as between Koon and Southard in another action, by Frost, for the foreclosure of a distinct and prior mortgage to Quackenbush, preventing him from asserting a legal priority to the surplus moneys to which he was apparently entitled. The parties to the record were not the same, nor the subject of controversy identical. As an estoppel by record, therefore, it fails; and as an estoppel *in pais* it is not conclusive, because there was no act done or omitted by Van Wagner which was intended to operate upon or did operate upon Southard; nor was Southard thereby induced to make any purchase or forego any rights which he would otherwise have insisted on; nor would the latter be legally prejudiced by having the truth now enforced.

3. The same remarks apply to the estoppel supposed to arise from Van Wagner's silence at the sale of the Eighth avenue property under Platt's mortgage. Southard lost no rights upon that occasion by the silence of Van Wagner, which he would now be prevented from enforcing, if Van Wagner's judgment were permitted to be collected; and besides, Southard was fully apprised of Van Wagner's legal rights, and that they would be insisted on, before he completed his purchase.

I am, therefore, of opinion that Koon is not estopped by any proceedings or conduct of his assignor, Van Wagner, from asserting his claim to these surplus moneys.

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4. The only serious question arises upon the legal effect of the release by Van Wagner of the Ninth avenue premises from the operation of his judgment. There is some reason for saying, with the referee, that if improperly released, it should not prejudice Koon beyond the proportional part of the judgment which those premises, in connection with Gilmore's other real estate ought to pay. But independent of that consideration, I am disposed to concur in the view taken of the case by the supreme court, to wit: that Southard has been guilty of so much *laches* in the assertion of his rights that he ought not to be permitted to enforce them against these surplus moneys. If he is entitled to these surplus moneys, it is upon the ground that the Van Wagner judgment is not a valid lien against the lands. If this were so, then those lands would not have been liable to be sold upon the execution issued on the Van Wagner judgment, and Southard, as a party interested in those lands, should have prevented such sale by injunction. But he neither interfered to prevent such sale, nor the consummation of the title by deed, nor the delivery of possession thereunder to the purchaser. It is well suggested in the court below that after such practical submission to the claim of Koon, Southard would not have been in a situation to maintain an action of ejectment, nor to seek equitable relief against him. Koon has been permitted, by the tacit acquiescence of Southard to pay his purchase money for the premises, and to consummate his title without objection or protest; and it is now too late to reinstate Koon in his original condition, and would be, I think, giving practical encouragement to excessive negligence and indirect injustice and fraud, to interfere in this stage of the proceedings to correct an imputed error or mistake growing out of a probable misapprehension of a rule of law.

I am in favor of *affirming* the order of the supreme court, with the costs of appeal.

Opinion of DAVIES, J.

DAVIES, J. (After stating the facts.) Five objections are mainly urged by the counsel for the appellants, to the right of Koon to the surplus moneys in this case.

1. That the judgment confessed by Gilmore to Van Wagner is void, on the ground that the statement upon which it is entered, was not in conformity with the code.

2. That previous to the sale in June, 1857, by the sheriff, on the execution issued upon the judgment in favor of Van Wagner, that judgment had been paid and satisfied.

3. That the lien of the judgment had been extinguished by the judgment of foreclosure and sale in the action commenced by Platt, to foreclose his \$700 mortgage upon the Eighth avenue property, to which action Van Wagner had been made a party defendant.

4. That it was the duty of Van Wagner to have collected the amount of his judgment out of the Ninth avenue property; and that having released the same, he is now precluded from a resort to the Eighth avenue property for that purpose.

5. That Van Wagner, and those claiming under him, are estopped from enforcing this judgment against the Eighth avenue property, on the ground that at the time of the sale under the Platt mortgage and the purchase of the premises by Southard, it was announced that there were no other liens upon the premises than the two mortgages to Myer and Quackenbush, and that Van Wagner did not then assert the lien and validity of his judgment, as he was bound to do. These objections will be considered in the order stated.

1. The defectiveness of the statement contained in the judgment. It authorizes a judgment to be entered for the sum of \$1,475, for a debt justly due to the plaintiff arising upon the following facts:

"Dec. 1st, 1852. Money was lent by the plaintiff to the defendant to aid in purchasing a lot in Forty-seventh street, to the amount of.....	\$200 00
"Aug. 1st, 1853. A balance was due to plaintiff by defendant on the purchase of Eighth avenue lot to	800 00

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" May 1st, 1854. Money was lent by the plaintiff to defendant to aid in purchasing lots on Ninth avenue to.....	\$300 00
" May 1st, 1854. And cash was lent by the plaintiff to the defendant at different times since above to.....	175 00
	<hr/>
	\$1,475 00

Which sum of one thousand four hundred and seventy-five dollars is now due by the defendant to the plaintiff, the interest on said sum having been paid till the date hereof.

"Dated NEW YORK, 29th December, 1854.

"(Signed.)

ROBERT GILMORE."

And which statement is duly verified by his oath.
mc

If this statement does not conform to the requirements of section 383 of the code, it is difficult to perceive how one can be drawn which would. The code requires the statement to be verified, and to contain 1st. The amount for which the judgment may be entered, and an authority to enter judgment therefor.

2. If it be for money due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor, is justly due. It is incontrovertible that all the matters required by the first subdivision of this section are contained in this statement. It states the amount for which the judgment may be entered, and authorizes its entry. The judgment being for money due, it also states concisely the facts out of which it, that is the indebtedness of the defendant to the plaintiff, arose. And the statement must show that the sum for which the judgment is confessed, is justly due. These facts are here given in great detail, and assuming, as we must, that they are truly stated, they show conclusively that the defendant, on the day he authorized the entry of this judgment, was justly indebted to the plaintiff in the sum named therein. The dates of the separate indebtedness, and the cause thereof are specifically stated, and could not well have

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John Van Wagner. The lien, therefore, under which Koon claims title to the surplus moneys dates back to the 29th day of December, 1854.

Southard claimed the surplus moneys as a mortgagee of the same premises under a mortgage from Robert Gilmore to him, executed on the 29th day of May, 1855; also, as a purchaser of the same premises on the 21st day of October, 1856, upon a mortgage foreclosure thereof, under a mortgage executed by Gilmore to George W. Platt on the 4th day of May, 1855. On this sale certain surplus moneys arose, a portion of which was paid to Southard as a subsequent mortgagee, but not enough to extinguish his claim as such. The lien, therefore, under which Southard and his executors claim title to the surplus moneys dates back to the 4th day of May, 1855—the date of the Platt mortgage.

This, it will be seen, is some four months subsequent to the lien of the Van Wagner judgment under which Koon claims; and, if there were no other circumstances in the case, would show a manifest priority of title on the part of Koon to the fund in controversy. This apparent priority is attempted to be overthrown by Southard in several ways.

1. It is contended that the Van Wagner judgment is invalid as against subsequent encumbrances on the property, by reason of a radically defective statement in the confession of judgment.

2. It is contended that Van Wagner and Koon are estopped from setting up any title to the surplus moneys by having been made parties to the foreclosure of the Platt mortgage under an allegation in the complaint which charged them as having or claiming an interest in the premises subsequent to that of the mortgage, making no defence to such foreclosure, and allowing judgment to be taken against them by default, and the surplus moneys to be distributed to other claimants; which is claimed to be equivalent to an admission by them upon the record that they had no lien upon said premises older or superior to that of the Platt mortgage.

3. It is contended that Koon's assignor, Van Wagner, (and consequently Koon), is further estopped from making such claim by Van Wagner's standing by at the sale under the Platt mortgage, and suffering the property to be sold at public auction and Southard to become the purchaser under a public announcement by the sheriff that there were no other liens upon the premises than those there stated (among which that of the Van Wagner judgment was not included.)

4. It is contended that Van Wagner—and if he, then Koon also—is precluded from making any claim to the surplus moneys, by reason of releasing from the operation of his judgment certain other premises situated on the Ninth avenue, which were bound thereby; also belonging to Gilmore, and sold under certain mortgages thereon, the surplus moneys upon which were properly applicable to the payment of this judgment; and, if applied thereto, would have left this fund arising from the sale of the Eighth avenue premises wholly applicable to Southard's claim.

5. It is contended that the Van Wagner judgment was paid and satisfied, and therefore not entitled to participate in the distribution of the surplus moneys. This last proposition it is unnecessary to discuss, as the referee who heard this cause has decided the question of fact arising thereon against Southard, upon sufficient evidence to justify his conclusion.

1. The Van Wagner judgment was not void. In conformity with repeated decisions of this court, it must be held that the specifications in the statement on which the judgment was founded were sufficiently minute, unless it be that relating to cash lent, and in regard to that, the statement is in substance that Gilmore was indebted to Van Wagner for cash lent at different times between the 1st of May, 1854, and the 29th of December, 1854, to the amount, in the aggregate, of \$175. I am inclined to think this also can be supported within the spirit of the decisions

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that the lien of the judgment had been extinguished because the amount of it had been included in the mortgage. If the mortgage had been paid or satisfied by the act of the mortgagee, there would have been force in this suggestion, but as it was extinguished by means of this foreclosure and sale, without the pretence of payment of any part thereof, the judgment remained wholly unaffected, by reason of the taking of the mortgage. Van Wagner was only made a party to the foreclosure under which Southard's purchase was made, as having an interest subsequent, and which subsequent lien he only had by virtue of *his* mortgage subsequent to the mortgage, and the decree or judgment in that action did not affect his right to enforce his judgment, which was a prior lien to the foreclosed mortgages. (*Lewis v. Smith*, 11 Barb. 156; Id. 5 Seld. 502; *Bank of Orleans v. Flagg*, 3 Barb. Ch. R. 318; Story Eq. Pl. § 259; *Elliott v. Pell*, 1st Paige, 263; *Holcomb v. Holcomb*, 2 Barb. 20.)

Lewis v. Smith was an action of ejectment to recover dower. The defendants set up in bar to the action a decree in a foreclosure suit, and a sale pursuant thereto—the defendants claiming and holding title from the purchaser at that sale. The mortgage was executed by the husband of Mrs. Lewis, she not joining therein, and she was made a party defendant, and was duly served with process to appear and answer, and also with a notice that no personal claim was made against her. It was alleged in the bill that the defendants therein named had, or claimed to have, “some interest in the mortgaged premises as subsequent purchasers or incumbrancers, or otherwise,” and the prayer was that all the defendants might be foreclosed of all equity of redemption and claim of, in, and to the said premises. The judge, at the circuit, held the foreclosure suit was conclusive against the plaintiff, and that the defendant was entitled to judgment. The supreme court reversed the judgment—holding that she was not called upon by the allegations of the complaint to answer as to her claim of

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dower in the mortgaged premises; that such right was superior, and prior to the lien created by the mortgage; and that the allegations of the complaint pointed only to liens or claims subsequent to that created by the plaintiff's mortgage; that she was justified in the belief that these interests of hers were not designed by the complainants to be brought into litigation in that suit. *Lewis v. Smith* was brought to this court, and the judgment of the supreme court affirmed. (5 Selden, 502.) In *Corning v. Smith* (2 Seld. 82), it was held by this court that where one claims adversely to the title of the mortgaged property, and prior to the mortgage, he cannot be made a party defendant in a bill to foreclose a mortgage for the purpose of trying the validity of such adverse claim, and the decree made disposing of such claim will be held erroneous, and will be reversed, though made after a hearing upon pleadings and proofs.

In the case of *The Bank of Orleans v. Flagg* (3 Barb. Ch. Rep. 318), the Chancellor said: "The bill in this case was not properly framed. To enable the plaintiff to litigate that question (that was priority over a lien or claim superior to that of the mortgage), instead of alleging falsely, that he had or claimed an interest in the premises which had accrued subsequent to this mortgage, the bill should have stated that he claimed an interest under a contract, or a pretended contract to purchase prior to the mortgage."

In the present case, Van Wagner was the owner and holder of two liens upon the mortgaged premises, one prior to the mortgage sought to be foreclosed, and the other subsequent. He was made a party defendant under the allegation that he claimed an interest in the mortgaged premises, arising subsequently to that created by the mortgage. He had only to answer that allegation, and by confessing the complaint, he was only concluded, as to such subsequent lien. The complaint property took no notice of the prior lien, and it was therefore unaffected by any allegation in it, or by anything done in the action. It is a well settled

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rule in equity pleading, that no facts are in issue, unless charged in the bill; nor can relief be granted for matters not chargeable, for the court pronounces its decree, *secundum allegata et probata*. (Story's Eq. Pl. § 269.)

In *Elliott v. Pell* (1 Paige, 263), the chancellor said: "The decree made upon the bill and answer must be taken with reference to the matters then in litigation before the court, and cannot be construed to affect the rights of any of the parties to the lands which were not the subject matter of litigation in that suit." In *Eagle Fire Company v. Lent* (6 Paige, 635), the chancellor declares the rule emphatically to be, that, so far as mere legal rights are concerned, upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage. And the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying the validity of his adverse claim of title in this case. And he says, the case is analogous in principle to making one who claims adversely to the vendor a party to a bill filed by the vendee for the specific performance of the contract of sale. In which case it has been held that such adverse claimant cannot be made a party for the purpose of having the validity of his claim settled by a decree of this court, which shall thereafter be binding upon him, in relation to his claim of title. (*Lange v. Jones*, 5 Leigh's R. 192.) The precise question now presented was adjudicated in *Holcomb v. Holcomb*, (2 Barb. S. C. 20.) Perry, the holder of a mortgage prior to that sought to be foreclosed, was made a party defendant to an ordinary bill to foreclose a mortgage. The complaint contained the usual allegations, that he (Perry) was made a party defendant, as a subsequent purchaser or incumbrancer; and it was sought to divest him, by the decree in the cause, of a title which he claimed to hold adversely to the parties to the mortgage, and which he acquired under a lien

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prior to the conveyance by the plaintiff to the mortgagee. The court say: "It is a general rule that, besides the parties to the mortgage, those only are proper parties to a suit for its foreclosure who have, subsequent to the mortgage, acquired rights or interests under the mortgagor or mortgagee. The plaintiff *may* also make prior incumbrancers parties to the bill, for the purpose of having the amount of such incumbrances liquidated and paid out of the proceeds of the sale; or he may, at his option, have the premises sold subject to such prior incumbrances. The object of the bill is to vest in the purchaser, under the sale made by virtue of the decree of foreclosure, the same title which the mortgagor had at the time of the execution of the mortgage. * * *. In this case, if, instead of making Perry a defendant, under the general allegation that he claimed an interest in the premises 'as subsequent purchaser, incumbrancer or otherwise,' the facts upon which the plaintiff relies to defeat the title of the defendant Perry had been alleged in the bill, he might have demurred to the bill upon the ground that the plaintiff had no right to bring him into court upon this bill of foreclosure, to try the validity of his title to the mortgaged premises."

In the case at bar, the plaintiff in Platt's foreclosure suit did not make Van Wagner a party as a prior incumbrancer, admitting the validity of the prior lien, and seeking only to have ascertained its amount, to the end that it might be paid and discharged out of the proceeds of the sale of the mortgaged premises, but he only sought to have foreclosed liens subsequent to that created by his mortgage. Under a decree made where the complaint contained allegations similar to those in the present case, prior liens or incumbrances are wholly unaffected, and it presents no bar or impediment to a party to such decree, from enforcing such prior lien or incumbrance. Such is the view taken by the legislature, when declaring the effect of a foreclosure in chancery, when it is declared that the deed to be executed by the master, "shall vest in the pur-

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chaser the same estate (*and no other or greater*) that would have vested in the mortgagee if the equity of redemption had been foreclosed, and such deeds shall be as valid as if the same were executed by the mortgagor and mortgagee, and shall be an *entire bar* against each of them, and against *all parties to the suit*, in which such sale was made, and against their heirs respectively, and all claiming under such heirs." (2 R. S. 192, § 158.) This court said, in *Lewis v. Smith* (*supra*), in reference to this section of the revised statutes, that, taking all the expressions together, it is obvious that the "entire bar," which is spoken of, refers to rights and interests in the equity of redemption, and does not embrace interests which are paramount to the title of both mortgagor and mortgagee. Such interest would be other and greater than would have vested in the mortgagee, if the equity of redemption had been foreclosed.

There is nothing in conflict with this doctrine in the case of *Drury v. Clark* (16 How. Pr. Rep. 424); and that case is in harmony with it. In alluding to the points contended for by the defendant in that case, Judge EMOTT observes that if they are maintained, the plaintiff will be compelled to state a variety of issues to different defendants; issues in which he has no interest, and to await their determination among the defendants, whom he is bound to make parties. This should not be permitted, if possible, and is not, I think, required. The complaint before us states that these various defendants have or claim each some interest in or lien upon the mortgaged premises; but, in every case, such lien or interest is subsequent and subject to the plaintiff's mortgage. He states sufficiently all that is necessary for the plaintiff's purpose. The fact that these defendants have or claim some interest in the lands mortgaged, makes them proper parties to the foreclosure; and the fact that these interests are subsequent to the plaintiff's lien, renders it unimportant to him, or to the purposes of his suit, so long as that is confined to the foreclosure and sale under his mortgage, what the particular rights of these

defendants are. They are only interested in the eventual surplus, if any, and their respective interests are material only among themselves, and not to him. All that the plaintiff asks, is a foreclosure of his mortgage against their estates or interests; and it is sufficient for that purpose, and to justify making them parties, that they have or claim some interest, or estates in the premises; but these, whatever they are, are subject to his mortgage. Any detail of their titles, or the extent and relative priority of their interests, would be superfluous if the suit is confined to the first mortgage, and the judgment proceeds no further.

It must be deemed, therefore, to be well settled, upon principle and authority, that the decree or judgment in the Platt foreclosure suit, in no sense, affected or impaired the validity of Van Wagner's judgment, or the lien created by it, and presented no obstacle to the subsequent sale of the premises covered by that mortgage, under the execution issued upon that judgment.

It is also insisted that it was the duty of Van Wagner to collect the amount of his judgment out of the Ninth avenue property; and that having released that property from the lien of his judgment, he was precluded from resorting to the Eighth avenue property for that purpose. The general rule undoubtedly is, that when a party holds a lien upon several parcels of property, and seeks to enforce it, equity will compel him to resort to the property, in the inverse order of its alienation, when the same may have been in the meantime alienated. And if the holder of such lien has notice of the rights or equities of others, or releases from the operation of his lien, property primarily liable for it and adequate for its discharge, he cannot thereafter resort to that portion of the property subject to his lien, secondarily liable for its payment. In the case now under consideration, Platt had purchased property worth \$4,400 beyond the five prior mortgages or incumbrances, except the judgment; and Southard had bought property worth \$2,150 beyond the two prior mortgages or incumbrances

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thereon, except the judgment; and they both bought at the same time and place. Before Southard obtained his deed, Van Wagner released to Platt, who had become the purchaser of the Ninth avenue property on a sale upon a foreclosure of his mortgage thereon, all his right and interest in said property. The effect of such release was to discharge the Ninth avenue property from the effect and lien of Van Wagner's judgment, and leaving it to rest solely on the Eighth avenue property. Southard, as the mortgagee of that property, by virtue of his mortgage, dated the 29th of May, 1855, had a superior equity to Platt, under his mortgage dated the 13th of July, 1855, on the Ninth avenue property, to have the latter property first applied to the payment of the Van Wagner judgment. A mortgagee is an alienee to the extent of his mortgage, quite as much as a grantee. (*Kellogg v. Rand*, 11 Paige, 59, 64.) Southard, therefore, by virtue of his mortgage, had an equity to insist that the Ninth avenue property, that aliened by Gilmore, should be first applied to the payment of the Van Wagner judgment. But this equity terminated when his mortgage was discharged, by the credit to him of the amount thereof in his purchase of the Eighth avenue property, subject to the Van Wagner judgment. That judgment was a lien on both parcels, and to be paid proportionally by each. The utmost that can be urged is that the release of Van Wagner discharged the Ninth avenue property from its proportionate part of the amount of that judgment, leaving the Eighth avenue property to respond to its proportionate part. It did not have the effect, as contended for by the counsel of the appellants, to discharge and satisfy the judgment wholly. A portion remained due in any aspect, and a sale by virtue thereof passed a good title to the purchaser. It was not a sale under a paid or satisfied judgment. Koon being a *bona fide* purchaser, therefore, acquired title to the premises, and as such owner was entitled to the surplus moneys arising upon the sale of the premises in this action. He holds the same under

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a prior title to that of Southard, whose title was subordinated, to the one which he acquired.

There remains to be considered the fifth objection, namely: That Van Wagner, and those claiming under him, are estopped from enforcing this judgment against the Eighth avenue property, on the ground that at the time of the sale under the Platt mortgage, and the purchase of the premises by Southard, it was announced that there were no other liens upon the premises than the two mortgages to Myer and Quackenbush, and that he did not then assert the lien and validity of his judgment as he ought to have done. The facts, as found by the referee, bearing upon this point, are that the sale, at which Southard purchased the Eighth avenue property, was made in fact subject to the two mortgages to Myer and Quackenbush, and that no other liens were announced at the sale; that Van Wagner was present at the sale; that Southard had no actual notice of the Van Wagner judgment when he bid on the foreclosure sale, and paid his ten per cent. for the Eighth avenue property, but he knew of it some months before he took his deed or paid the balance of his bid. And the referee found, as a conclusion of law, that the omission of Van Wagner, at the sale on the foreclosure, to give notice of his judgment, did not estop him now, or those claiming under him, from setting up the same. It is to be observed here that the referee has not found, as claimed, that it was announced at the sale, that there were no other liens upon the premises than the two mortgages to Myer and Quackenbush.

If Van Wagner had, at the sale, announced that his judgment was not a lien, or remained silent when such an announcement had been made, I think he would have been estopped from afterwards claiming it to be a lien. But the referee does not find that anything was said at the sale about the lien of the judgment, and therefore Van Wagner was not called on to say anything in relation to it. But a complete answer to this objection is, that before Southard

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completed his purchase he had full knowledge of all the facts. It appears that Southard, although he did not know of the existence of the Van Wagner judgment when he bid at the foreclosure sale and paid his ten per cent, yet he did know of it some months before he took his deed and paid the balance of his bid. He was not, therefore, a *bona fide* purchaser, without notice of the judgments. If he had not elected to take the property subject to the judgment, and he had purchased it under such circumstances as would entitle him to have the property relieved from the lien of the judgment, the court, on his application, would have released him from his bid, and directed a return to him of the ten per cent paid. He cannot now be permitted to set up that he did not know of the existence of this lien, after having elected to complete his purchase with full knowledge of it. Upon the facts found by the referee, there is no ground for applying the rule of estoppel as recognized and approved by this court in *Thompson v. Blanchard*. (4 N. Y. Rep. 303.)

Southard's executors are not personally charged with the costs of the proceeding by the order appealed from, and on this appeal we cannot review the adjustment of costs. We cannot look into the adjustment to ascertain that any items have been allowed not authorized by the code. The sum at which they were adjusted must necessarily include the expenses of the two references and hearings before the referee, and there is nothing to show in the appeal papers that the sum was arbitrarily fixed. The judgment directs that the costs be paid by the appellants, executors of Thomas Southard, deceased; and this is a direction to pay the same out of the assets of the deceased in their hands, and not that the executors should pay the same personally. (3 R. S. 5th ed. p. 555, § 317.)

The order appealed from should be affirmed.

Order affirmed.

Abstract of case.

GUNNING S. BEDFORD v. HENRY TERHUNE and GEORGE B. EDWARDS.

It is essential to an under-letting of demised premises that it be of a part only of the unexpired term. When the transfer is of the whole of a term, the person taking is an assignee, and not an under-tenant, although there be in form an under-letting.

In the absence of any evidence of the agreement under which parties entered into possession of demised premises, subsequent to the lessees, if it is shown that they occupied during the whole of the unexpired term of the lease the fair presumption is that they entered for the whole of such unexpired term. And as such an interest is given, not by an under-lease, but by an assignment, the presumption must be that the occupants are in as assignees, and not as under-tenants.

Where by the terms of a lease it is made a ground of forfeiture of the term if the lessees shall let or under-let without the written consent of the lessor, and parties other than the lessees are in possession without such consent, in the absence of any proof as to the agreement under which they entered, the presumption (if any presumption is to be indulged in), is that the transfer to the occupants was by assignment, and not by under-letting. If they are in as under-tenants, they will not be liable to the landlord for the rent, either in an action on the lease, or for use and occupation.

Where the defendants entered by consent of the lessees, had the lease in their hands, and paid the rent thereon, to the lessor, for the benefit of the lessees, and occupied for the whole residue of the term, and there was no evidence of a holding in any other character; *Held*, that under these circumstances the law would presume they were in as assignees of the lease; and that they were liable as such on the lease, for the rent.

When the law infers an assignment of a lease from certain facts proved, the inference must be of a valid, operative assignment, such an one as would be sufficient to transfer the term. And it is incumbent upon persons sought to be charged with the rent, as assignees, to prove either that there was no assignment, or that it was one void in law.

A lessor cannot recover rent upon a complaint for use and occupation, where it appears from the evidence that there was a lease of the premises to other parties, and that the defendants were in as assignees of the term. But in such a case, the court may, on the trial, allow an amendment of the complaint so as to conform it to the proof, and permit a recovery for the rent due on the lease, where it does not appear that the defendants have been surprised.

In an action for use and occupation, a lease from the plaintiff to other parties, which had two years to run from the entry of the defendants, being proved; it was *held* that it was incumbent on the plaintiff to prove it surrendered, so that they were at liberty to re-let the premises; and that if a surrender in law was proved, the defendants were liable for the rent.

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In order to effect a surrender by act or operation of law, there must be a mutual agreement between the lessor and the original lessee that the lease shall terminate.

It is not necessary that this agreement should be express. It may be inferred from the conduct of the parties.

The occupancy by some person other than the lessee is a circumstance showing a surrender; but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term.

It must be proved that the lessor and lessee mutually agreed to a surrender of the term; and that proved, the original tenant is no longer liable; but the new tenant (if there be one), is liable.

Where tenants sued for use and occupation by the original lessor, insist that they entered under the lessees, and show the lease in their hands, and prove the payment of rent by them on the original lease for the benefit of the lessees, they are liable as assignees of the term for the rent accruing after their entry.

THIS action was brought to recover the rent of a store and basement, in the city of New York, for a quarter of a year, commencing the 1st of February, 1858, and ending on the last day of April of the same year.

The complaint set forth the ownership by the plaintiff of the premises, and the occupancy by the defendants for the quarter ending the 1st of May, 1858, and alleged that the use of said premises was reasonably worth the sum of \$450, which the plaintiff had demanded, but the defendants refused to pay.

The defendants, in their answer, deny that they ever occupied the premises as tenants of the plaintiff, or that they are indebted to him in any sum whatsoever. They then allege that the plaintiff, on the 1st of August, 1855, leased the said premises to E. & A. Ingraham & Co. for the term of two years and nine months, from the 1st day of August, 1855; that the defendants hired, used and occupied said premises solely as tenants of said E. & A. Ingraham & Co., and that the plaintiff had never recognized the defendants as his tenants, or in any manner accepted a surrender of the lease to E. & A. Ingraham & Co.

On the trial in the marine court, the plaintiff proved, by

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his agent, his ownership of the premises in question, and the occupancy by the defendants for the term charged in the complaint, and that the use was worth \$450.

On the cross-examination of the agent, it was proved that the witness, as agent of the plaintiff, had executed and delivered to E. & A. Ingraham & Co. a lease of the premises in question, under seal, for the term of two years and nine months, from the 1st of August, 1855, at the yearly rent of \$1,800, payable quarterly, said lessees not to let or underlet without the written consent of the plaintiff. The lessees had the right to a renewal for two years from and after the expiration of the said term, provided they gave the plaintiff notice in writing of their intention on or before the 1st of February preceding the end of the term.

There was an agreement put in evidence, signed in the name of the firm, with a seal affixed, whereby said E. & A. Ingraham & Co. agreed to pay the rent and certain proportions of water taxes, and not to let or underlet said premises.

The defendants put in evidence eight receipts for so many quarters rent of the said premises, the first being dated May 1st, 1855, in full for quarter's rent due at the date, and the last March 2d, 1858, being for quarter's rent due on the 1st of February, 1858, signed by the plaintiff by his agent, and acknowledging the receipt of said rent from the defendants, on account of E. & A. Ingraham & Co.

It was further proved, that after the plaintiff heard of the failure of Ingraham & Co. he and his agent went to the store and saw the defendants, who were then in possession, and they told the plaintiff he need not be afraid about his rent; that they intended to occupy the premises for the same business carried on by said Ingraham & Co. The defendants did continue to occupy and pay rent. On the 1st May, 1858, when called on for the rent, they said they had paid enough for Ingraham & Co., and should pay no more, as they (I. & Co.) owed them largely.

In March, 1858, in a conversation between the plaintiff's

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agent and the defendants in reference to an extension of the term, the defendants claimed they ought to have it for the additional year, as they were among the plaintiff's best tenants, and had always paid punctually. On two occasions during the defendants' occupancy, they offered the plaintiff's agent notes for the rent, but did not say whose notes.

The plaintiff's counsel then put this question: "*Whose notes did you understand them to offer?*" The defendants' counsel objected to the question. The court overruled the objection, and the witness answered: "*I suppose their own notes.*" The defendants gave no evidence.

The defendants' counsel moved to dismiss the complaint. 1. Because there was no contract between the plaintiff and the defendants. 2. That the plaintiff had shown nothing from which the legal relation of landlord and tenant could be inferred. 3. That any presumption which might arise from the occupation of the premises is rebutted by the proof of hiring.

The motion was denied, and the defendants' counsel excepted. The defendants' counsel then asked the court to charge, in respect to the alleged agreement, that it was collateral to the undertaking of Ingraham & Co. and void. The court refused so to charge; but did charge, that if the jury believed the parties made the agreement as sworn to by the witness, and entered upon it at the time it was made, and carried it out up to the last quarter by the one party paying the rent every quarter and occupying the premises, and the other party receiving the rent each quarter, in law, the defendants were liable for this rent. But if they believed no such agreement or understanding was made or had, then the defendants were not liable. The defendants' counsel excepted to this branch of the charge.

The jury found a verdict for the plaintiff for the quarter's rent. An appeal was taken to the general term of the marine court, and the judgment was there affirmed. From the last-mentioned judgment an appeal was taken to the

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common pleas of the city and county of New York, and it was there affirmed. The court of common pleas having allowed an appeal to this court, an appeal was taken accordingly.

Albert Mathews, for the appellant.

Philip Reynolds, for the respondent.

MULLIN, J. The defendants must have occupied the premises in question either as sub-lessees of Ingraham & Co., as their assignees of the term, or as the tenants of the plaintiff; and if they are liable for the rent to the plaintiff, in either of these characters, the judgment appealed from should be affirmed.

1. Were the defendants under-tenants of Ingraham & Co.? No agreement to underlet is proved; nor is there any fact proved from which an underletting could fairly be inferred. It was a ground of forfeiture of the term if Ingraham & Co. let or underlet without the written consent of the plaintiff, and no such consent is pretended. It cannot be presumed that the defendants and Ingraham & Co. designed to make a transfer of the lease or of the term, in a way which *eo instanti* forfeited it, if there was any other mode in which the defendants could acquire the possession that would not produce such a result. If we are permitted to indulge in presumption, then the presumption upon the facts proved would be that the transfer to the defendants was by assignment and not by underletting. The defendants held for the whole residue of the unexpired term of the lease, commencing in February, 1855. When the transfer is of the whole of a term, the person taking is an assignee and not an under-tenant, although there is in form an underletting. It is essential to an under-tenancy that it be of a part only of the unexpired term.

In Woodfall's Landlord and Tenant, 345, it is said, "an assignment, as contra-distinguished from an under-lease,

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signifies a parting with the whole term." Again, at page 358 of the same author, it is said, "an under-lease of the whole term amounts to an assignment." In 1st Hilliard's Abridgment, 126, § 55, it is said, "the ordinary distinction between an assignment and an under-lease is, that the former transfers the land for the whole term; the latter for only part of it."

In the absence of any evidence of the bargain under which the defendants entered into possession, and it being shown that they occupied the whole of the unexpired term of the lease to Ingraham & Co., the fair presumption is that they entered for the whole of such unexpired term; and as such interest is given, not by an under-lease, but by an assignment, the presumption must be that the defendants were in as assignees, and not as under-tenants. But if they were in as under-tenants, they would not be liable to the plaintiff for the rent, either in an action on the lease or for use and occupation. (Woodfall's L. and T. 358; 1 Chitty's Pl. 36; Taylor's L. and T. 448.)

2. Were the defendants assignees of the lease? The defendants were in possession, having the lease from the plaintiff to Ingraham in their hands, and they paid the rent to the plaintiff upon that lease, for the benefit of Ingraham & Co. When to these considerations are added the reasons assigned under the foregoing proposition, why the defendants were assignees and not under-tenants, the conclusion would seem to follow that the defendants were assignees of the term; they occupied for the whole residue of the term, and there is no evidence of a holding in any other character. Under these circumstances, the law presumes the defendants in as assignees of the lease. (4 Hill, 112; Taylor's L. and T. § 429.)

In *Quackenboss v. Clarke* (12 Wend. 555), Clarke sued Quackenboss for rent as assignee of a lease given by him to one Washington. The defendant denied the assignment. And on the trial it was shown that the lessee had sold his interest to one Hardy, but did not execute an assignment

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to him; that Hardy sold his interest to the defendant, delivered to him the lease, but did not execute an assignment. There was a verdict for the plaintiff, and the defendant brought error. SAVAGE, Ch. J., delivering the judgment of the court, says: "The fact of possession is sufficient evidence of an assignment in the first instance. The fact of an assignment is a transaction between the defendant and the lessee, of which the plaintiff is not cognizant, but the defendant is. There is no hardship, therefore, in concluding him by his possession, unless he discloses the true state of his title." The same was held in *Armstrong v. Wheeler* (9 Cowen, 88), and in *Williams v. Woodard* (2 Wend. 487), and these cases rest on 2 Phillip's Ev. 150; 3 Bos. and Pul. 461.

In 2 Phil. Ev. 150, the doctrine is stated more fully. The learned author says: "When the action is brought against the defendant as assignee of the term; and the issue is on the assignment, it will be enough for the plaintiff to give general evidence, from which the assignment may be inferred, or that the defendant is in possession of the demised premises, or has paid rent. Payment of rent by the defendant to the plaintiff, when the defendant has been let into possession by the original lessee, is *prima facie* evidence of the assignment of the whole term. * * * The defendant who is charged as assignee of a term, is at liberty, in an issue on the assignment, to show that he holds the premises as under-tenant to the lessee, and not as assignee."

Every fact was proved in this case required to establish an assignment to the defendants of the term. And they gave no evidence to rebut or overcome the *prima facie* case thus made against them.

Under the statute of frauds, the assignment of a lease must be made in writing, or it is void. If there was in fact no assignment in this case, the defendants could not be made liable. But as the law infers an assignment from certain facts proved, the inference must be of a valid

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operative assignment, such an one as was sufficient to transfer the term. It was incumbent on the defendants to prove either that there was no assignment, or that it was one void in law.

Instead of making such proof, they have satisfied themselves with the case as made by the plaintiff, and as that case fixes their liability, they should not complain.

The defendants being assignees, they were liable, on the lease, for the rent. The covenant to pay rent runs with the land, and binds the assignee, even though he is not named in it. (*Jacques v. Short*, 20 Barb. 269; 23 Wend. 506; 3 Den. 284; *Woodfall's Landlord and Tenant*, 278.) It seems to me, therefore, the defendants must be deemed assignees of the lease, and liable as such.

The pleadings are not framed to charge the defendants in that character. The complaint claimed to recover for use and occupation, disregarding altogether the lease to Ingraham & Co., and a transfer thereof to the defendants. When the whole evidence was out, it was established that the plaintiff could not recover for use and occupation. They must recover, if at all, upon the covenants in the lease. And the question now is, was the court at liberty, on the trial, to amend the complaint so as to conform it to the proof; or was there such a failure of proof as defeated altogether a recovery.

To permit a recovery in this case is to carry the right of amendment as far, it seems to me, as it is possible to carry it and not overlook altogether the great end and aim of all pleading which is to inform the opposite party of the cause of action or defense which he is called upon to meet.

The courts have been very liberal in giving effect to the provision of the code that permits variances to be disregarded, and amendments to be made conforming pleadings to proofs. In *Robinson v. Wheeler* (25 N. Y. 252), the complaint charged that the defendant had set fire to and destroyed a wood shed on premises of which he owned the reversion. On the trial it was proved that the building

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was destroyed by the negligence of the defendant, and the plaintiff was permitted to recover.

In *Byxhie v. Wood* (24 New York, 607), the plaintiff claimed to recover for money obtained from him by fraud. The fraud was not found by the referee, yet the plaintiff was held entitled to recover.

In *Harpending v. Shoemaker* (37 Barb. 270), the action was for money had and received, &c. On the trial the plaintiff offered to prove that the defendant had unlawfully taken and converted his property, sold it, and received the avails. The evidence was held competent, and the plaintiff was permitted to recover.

In all these cases, the plaintiff was permitted to recover on a case essentially different in its facts from that stated in the complaint. And it seems to me, it would be giving effect only to the principle on which these cases were decided, to hold that the plaintiff in this case was entitled to recover the rent due on the lease, notwithstanding the action is for the value of the use and occupation.

Aside from the principle on which such a recovery may be supported, the circumstances of the case justify the court in permitting the plaintiff to take judgment for the rent. 1st. The amount claimed and recovered, is the rent due by virtue of the lease. 2d. The plaintiff on the proof given by him when he rested, was entitled to recover for use and occupation. And it was the defendants' proof of the lease that produced the difficulty in the case. Even the grounds of this defense are not set out in the pleadings. He was not surprised. He held in his own hands the evidence which defeated an action for use and occupation, and which authorized a recovery on the lease.

While I entertain serious doubts whether the principles on which the right of recovery in this case must rest, will not be the source of trouble in trials at the circuit, yet I do not think it is carrying the right of amendment farther than has been done in the case cited. I am, therefore, in favor of affirming the judgment as a recovery on the

lease; it not being suggested that the defendants were surprised.

3. Were the defendants tenants of the plaintiff, and as such, liable for use and occupation? A lease to Ingraham & Co., which had two years to run from the entry of the defendants being proved, it was incumbent on the plaintiff to prove it surrendered, so that he was at liberty to re-let the premises. And if a surrender in law is proved, the defendants are liable for the rent.

A surrender is defined to be the resignation of a particular estate for life or for years to him in the immediate reversion or remainder. (Comyn's Digest, title Surrender A.) The surrender may be made by deed, conveyance in writing, or by act or operation of law. (3 R. S. 220, § 6.)

If there is a surrender in this case, it is by act or operation of law—there being no deed or conveyance in writing shown or pretended.

There is a surrender by act or operation of law, when the owner of a particular estate has been party to some act the validity of which he is by law afterwards estopped from disputing, and a lien created which would not be valid, if his particular estate had continued. (*Springstein v. Schermerhorn*, 12 J. R. 357; *Vun Rensselaer v. Penniman*, 6 Wend. 569; *Livingston v. Potts*, 16 J. R. 28.)

In order that the second lease may operate as a surrender of the first, it is essential that the lease be a valid one. It was held in *Schieffelin v. Carpenter* (15 Wend. 400), that a parol lease for more than a year to a third person, though he takes possession, will not operate as a surrender. The same rule was applied in *Whitney v. Meyers* (1 Du. 266).

It is not necessary that the second lease should be to the first lessee. If given to a third person by the consent of the first lessee, it operates as a surrender.

In *Walls v. Atcheson* (24 Eng. C. L. 228), it was held that a landlord could not recover rent of his tenant, where the latter had abandoned the premises during the term, and the landlord had let them to another not for the benefit of

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the original lessee. The acts of the parties were treated as a rescission of the agreement, and to have dispensed with a surrender. (See same case in 12 Eng. C. L. 565.)

In *Nickells v. Atherstone* (59 Eng. C. L. 943), the plaintiff had let the premises to the defendant for three years. At the end of the first year the defendant quit, and wrote a letter to the plaintiff in which he requested him to let the premises to some other person. The plaintiff did let them to another for three years, and the new tenant entered and paid two quarters' rent, and became insolvent. The action was brought for the balance of the rent due by virtue of the lease to the defendant, after applying the amount paid by the new tenant. The question was submitted to the jury whether the plaintiff had accepted the new tenant in substitution and discharge of the defendant. The jury so found. The judge instructed them that if they so found, the verdict should be for the defendant. The plaintiff had leave to move for liberty to enter a verdict for himself, a rule *nisi* having been obtained. The court held that there was a surrender of the old lease, by operation of law.

In *Smith v. Niver* (2 Barb. 180), it was held by HARRIS, J., that where a landlord has consented to a change of tenancy, and has permitted a change of occupancy and received rent from the new tenant as an original and not a subtenant, he cannot afterwards charge the original tenant for rent accruing during the occupation of the new tenant.

I have referred to these cases because they are the most favorable of any I can find to the plaintiff, and yet they do not go far enough to sustain this action against the defendants as holding directly from the plaintiff.

It will be seen that in all of the cases a mutual agreement between the lessor and the original lessee that the lease terminates, must be shown. It is not necessary that the agreement should be express; it may be inferred from the conduct of the parties. The occupancy by some other than the lessee is of course a circumstance to show a sur-

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render; but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term. In short, it must be proved that the lessor and lessee mutually agreed to a surrender of the term, and that proved, the original tenant is no longer liable; but the new tenant (if there is one) is liable.

What evidence is there in this case, of an assent by Ingraham & Co. to a surrender of their lease? No witness has testified directly to any such fact. It does not appear that they and the plaintiff ever spoke together upon the subject. The fact that the defendants held their counterpart of the lease; that they (Ingraham & Co.), quit possession, and that the defendants entered, occupied and paid rent, and even claimed to be tenants, is entirely consistent with a continuance of the original lease, and occupancy by the defendants as under-tenants or assignees of the lessees. There is not a particle of proof that Ingraham & Co. have ever consented to a letting by the plaintiff to the defendants, or even that they knew that any such thing was contemplated.

For aught that appears in this case, the defendants are liable to Ingraham & Co. for the rent of the premises during the whole period they were in possession.

In *Drury Lane Co. v. Chapman* (1 Carr. & Kir. 14), it appeared that the plaintiffs had rented certain counters in the saloon of the theatre to Mrs. Chapman, mother of the defendant, for some years; she entered and occupied less than a year, and died. The defendant applied to the plaintiffs to take him as their tenant, and they accepted, and he entered and paid rent for a part of the term. The plaintiffs sued him to recover for the use and occupation of the premises. The defendant put in evidence the lease to his mother, and letters on her estate to another son. The court put it to the jury to say whether the defendant entered

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under a new contract with the plaintiffs for the use of the premises, or whether he entered under the lease to his mother. The jury found he entered under a new agreement, and there was a verdict for the plaintiff. The court refused a rule to show cause why there should not be a new trial. If this case was rightly decided, it follows that it is wholly immaterial whether there is an outstanding lease when the new agreement is made. It is enough if the plaintiff is able to prove the new agreement; the defendant is then estopped from disputing his title. In the case cited, it is obvious that by the death of Mrs. Chapman her lease was not annulled. It passed to her representatives, who were entitled to the use and occupation of the premises, and the defendant was in law liable to them. In *Doe v. Wood* (14 Man. & G. 681), H. had leased certain premises of Lady H., and died, leaving a widow. She continued to occupy and pay rent to Lady H. J. H. took out letters of administration on H.'s estate, and after such letters taken, the widow, with the knowledge of the administrator, occupied and paid rent to Lady H., and he never objected to such payment or made demand for the rent. The administrator brought ejectment against the widow and her second husband, and it was held that there was no evidence of surrender, by operation of law, so as to create the relation of landlord and tenant between Lady H. and the widow, and the plaintiff recovered.

These two cases cannot stand together. The first is in utter disregard of the well-settled rule that the lessor cannot recover against a third person for the use and occupation of premises, unless he shows a surrender of the original lease. In the case last cited, it is quite clear that there ought not to have been a recovery, if the widow was the tenant of Lady H.

There may be a recovery by the original lessor against a third person who enters during the running of a lease, under an express agreement with such lessor for the occupancy, when this entry is under such contract exclusively,

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and has no connection whatever with the original lease; and when the original lessee has omitted to assert any claim to the premises, or for the rent thereof. In such case the new tenant may properly be held estopped from disputing the title of his lessor. (*Phipps v. Sculthorpe*, 1 Barn. & Ald. 50.)

But in this case the tenants insist that they entered under Ingraham & Co., and show the lease, and prove payment of rent by him on the original lease, for the benefit of the original lessees.

Believing the defendants are liable, as assignees of the term, for the rent claimed, I am in favor of affirming the judgment, with costs.

Judges DAVIES, WRIGHT, SELDEN, and HOGEBROOM were also for affirmance.

DENIO, CH. J. I should be glad to affirm this judgment if it could be done consistently with the rules of law; but there are insuperable difficulties in coming to that conclusion.

The evidence was perhaps sufficient to charge the defendants as assignees of E. & A. Ingraham & Co., though the terms of the receipts for rent which the plaintiff received, would have raised some questions on that point. But it is a conclusive objection to a recovery upon that ground, that the action was not upon the lease, and that it did not seek to charge the defendants on the ground of privity of estate, but upon an independent letting of the plaintiff to them. And if the difficulty arising out of the pleadings could be obviated by conforming them to the proofs according to the code (§ 175), the same difficulty would be presented by the charge of the judge, by which the jury were instructed that the plaintiff could not recover, except upon the ground of an independent letting by him to the defendants. The idea of a recovery upon the original lease against the defendants as assignees, was thus entirely precluded.

The question to be considered therefore is, whether there

was such evidence of a letting by the plaintiff to the defendants as was suitable to be submitted to the jury. I do not appreciate the objection urged by the defendants' counsel, that such a letting could not be set up, on account of the existence of the lease from the plaintiff to Ingraham & Co. They had failed in business, and had gone out of possession. If then the plaintiff had let the premises to the defendants by a new and independent arrangement, at the same rent which the former lessor had agreed to pay, or any other rate of compensation, and the defendants had occupied for the residue of the original term, and the first lessees had interposed no obstacle, and had not interfered with the defendants' enjoyment, the present defendants could not have set up the continuance of the former demise as an answer to the claim made against them for the rent which they had agreed to pay. But there was no proper evidence of a fresh letting by the plaintiff to the defendants. The plaintiff and his agent, and the defendants had a conversation, in which it was assumed that Ingraham & Co. had failed. The defendants said that the plaintiff need not fear or be concerned about the rent; that they intended to occupy the store for the same business. This was pretty vague, but possibly it might have been enough, connected with the subsequent occupation by the defendants, to enable the jury to find a new letting, had there been nothing else in the case. But the plaintiff continued to give and the defendants to receive, at the expiration of each quarter, written receipts for the quarterly rent, at the rate mentioned in the original lease, stating on their face in each instance that the money was paid for the account of E. & A. Ingraham & Co. This is precisely the same thing as though the plaintiff had continued to receive the rent as it accrued, from the original lessees. It was quite competent for these lessees, notwithstanding their failure in business, to retain the leasehold estate granted to them by the plaintiffs by the original lease of the store, unless they should be divested of it by legal process, or by

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an insolvent's assignment, and it seems to me that they did so retain it by causing the rent to be regularly paid. These payments, by the terms of the receipts which were given for them, were referable to the original lease, and to no other subject; and they kept that lease in full vigor down to the last quarter day preceding the quarter for which the plaintiff sued the defendants. The arrangements between Ingraham & Co. and the defendants, by which the latter actually advanced the several amounts paid for rent, were not disclosed, and they are not material. The plaintiff consented to receive his rent from the parties named in the written lease by the hands of the defendants, and in the absence of any fraud or mistake, he cannot say that there was not on each occasion of such payment an affirmation of the continued existence of that lease. It strengthens rather than impairs the force of this evidence, that the defendants dictated the terms of the receipts. That circumstance shows that they were unwilling to part with the money, except on the footing of payments made by or on account of Ingraham & Co., in satisfaction of the liability of those lessees. The giving and accepting of these receipts was a conclusive answer to any inference which might otherwise have arisen from the conversation which has been referred to, and it was erroneous to submit to the jury a theory entirely hostile to the legal effect of these transactions.

The other conversation in which the defendants claimed consideration upon the question of a further lease, for their punctuality in the payment of the rent, did not materially strengthen the plaintiff's case. The payments of rent referred to were, of course, those made in behalf of Ingraham & Co.; for the defendants made no other payments. The nature and effect of these payments were determined by the co-temporary receipts, and were not at all changed by this loose reference to them in that conversation.

I am in favor of reversing the judgment against the defendants, and of ordering a new trial.

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INGRAHAM, J. There was no evidence showing a surrender of the lease to Ingraham & Co. The plaintiff proved the giving of such a lease, and during its term the presumption of law was that it continued in force between the parties. This presumption was further proved by the receipts given by the plaintiff for rent from the defendants down to the quarter preceding that for which this rent was claimed. These facts were undisputed, and as matter of law established that there could be no implied hiring between the plaintiff and defendants.

The judge, therefore, erred in holding that there might be such an agreement, and in submitting to the jury the question whether such an agreement was made.

The judgment should be reversed. JOHNSON, J., was also for reversal.

Judgment affirmed.

Statement of case.

THE PEOPLE *ex rel.* ISAAC OTTMAN v. HENRY A. HYNDS and others, Com'rs of Highways of the Town of Seward.

An order laying out a highway through improved, inclosed, or cultivated land, signed by only two of the commissioners of highways, and not reciting the fact that the third participated in the proceedings, or was notified to do so, is void.

THIS is an appeal from the judgment of the general term of the supreme court in the third district, affirming a judgment in favor of the defendants on mandamus, rendered at the Schoharie circuit in November, 1858.

In 1855, the relator sued out an alternative writ of mandamus, requiring the commissioners of highways of the town of Seward, Schoharie county, to open for public use a highway that he alleged had been previously duly laid out, or show cause to the contrary. The defendants made a return to the writ, showing for cause against opening the said road:

1st. That the road was laid out by two commissioners, over cultivated land, without the certificate of twelve freeholders.

2d. That the order requiring said road to be laid out is defective in being made by two commissioners without showing that the third participated in the proceedings, or was notified to do so.

3d. That the road was laid out through a door yard and enclosure of the Lutheran church parsonage, necessary to the enjoyment of the buildings thereon; and that no notice of the proceedings was given to said church, its officers or the occupant of said lot.

These allegations were all controverted in an answer put in by the relator to this return. The case was tried at a circuit, when a peremptory mandamus was awarded. This determination was reversed by the general term. (27 Barb. 94.) On the second trial at the circuit, before Justice

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GOULD, without a jury, judgment was given for the defendants, and the relator appealed to the general term, where the judgment of the circuit was affirmed. He now appeals to this court.

By an order dated September 28th, 1854, two of the commissioners of highways of the town of Seward undertook to lay out the highway in question, in that town. The order recites that notice was given "that the undersigned commissioners of highways of said town would attend," &c., to decide upon the application, and the order was signed by but two commissioners, when it was required by law that there should be, and there were in fact, three commissioners of highways in said town. It does not appear in the order that all the commissioners met, or that all were notified to attend the meeting, when the question of making the order was to be determined, and there is no recital upon that subject.

The order referred to was made upon the certificate of twelve persons, who are described as freeholders. William J. Dunkle was one of the persons who signed this certificate, and it was shown that all the interest he had in any real estate, at the time of signing the certificate mentioned, was what he acquired under a deed from Isaac Hutton to Philip P. Wieting. The farm was designed for Dunkle, who made the purchase, or the agreement therefor, and paid \$1,000 thereon. Not being able to pay the residue of the money, Wieting advanced the same at his request, and having received a deed therefor for the purchase price of \$4,200, executed a mortgage thereon for the balance, \$2,200, but agreed to convey to Dunkle, on the latter repaying the \$1,000 advanced, and paying the bond and mortgage. Proof of these facts was received by the judge against the objection and exception of the counsel for the relator.

The relator offered to show, by parol, that all the commissioners actually met and deliberated at the time the order was made, which was ruled out.

The judge, at the circuit, gave judgment for the defend-

ants, "for the insufficiency of the commissioners' order." No formal finding of facts was made by the judge, and no exceptions were taken to his findings or his conclusions of law otherwise than a general exception to his decision that the defendants were entitled to judgment for the insufficiency of the order.

John K. Porter, for the relator (appellant).

H. Smith, for the defendants (respondents).

HOGEBOOM, J. The judgment should be affirmed.

I. There was not a certificate of twelve *freeholders*. Dunkle was not a *freeholder*. He had not the legal title to the farm. That was either in Hutton or Wieting. Dunkle could not convey. He had an *equitable* title which might perhaps be converted into a legal title. The statute, by freeholders, means such as have the legal title to real estate—such as are freeholders without a proceeding in court to make or declare them so.

II. If there was not a certificate of *twelve freeholders*, the subsequent proceedings would be entirely *void*. At all events the commissioners were not bound to proceed. (*Ex parte Clapper*, 3 Hill, 458; *People v. Commissioners of Seward*, 27 Barb. 96; *People v. Eggleston*, 13 How. 123; *People v. Supervisors of Greene*, 12 Barb. 217.)

III. The notice of the hearing before the commissioners was a notice of the hearing before *two* commissioners alone. Such was the notice, and there is no proof to contradict it. More than those two would have been incompetent to act, and the intervention of the third commissioner would have been without *authority*, and would have made the proceedings *void*. This is the *fair* construction of the order. There can be no proper *presumption* against this.

IV. The order itself is *void*, as made by two commissioners, without the intervention of a *third*, or *notice* to him recited in the order. (1 R. S. 525.)

1. The statute (1 R. S. 525), was intended to make an

absolute and universal rule for cases of this kind, and to prevent any presumptions whatever. See notes of revisers, 3 R. S. (2d ed.) 520, citing 9 Johns. 360, and laws of 1826, page 229, section 9, and intending to express the result of that decision and that statute. (*Stewart v. Wallis*, 30 Barb. 344; *Fitch v. Commissioners of Kirkland*, 22 Wend. 135; *Contra, Tucker v. Rankin*, 15 Barb. 471.)

2. The general statute authorizing a majority of public officers to act under certain circumstances, is *limited* to cases where no special provision is otherwise made. (2 R. S. 5th ed. 869, § 29, 555.)

3. The order must be sufficient on its face. Its defects cannot be helped out, or supplied by parol. (*Fitch v. Commissioners of Kirkland*, 22 Wend. 135; Broom's Legal Maxims, 27, &c.; Smith on Statutes, 654, 655.)

The question is, whether the commissioners who were called upon to lay out the road, being presented with an order made by former commissioners, defective and insufficient on its face, were *bound* to proceed and consummate the proceedings. I apprehend they were not required—even if they were permitted—to search for parol evidence to fortify a defective order, and to show that *in fact* all the commissioners met and deliberated on the application to lay out the road, or were notified to do so. The office would be a thankless one if a mandamus could be issued against them in effect requiring the performance of such a service. They had a right to judge of the order by its contents.

V. Even if the order alluded to was not incurably defective, the omission to produce a certificate of twelve freeholders is *fatal*, and makes the whole proceedings *void*.

The judgment should be *affirmed*.

All the judges concurred, on the ground that the order did not show that all the commissioners met. Upon the other points they (except WRIGHT, J., who was for affirmance generally), were in doubt, and did not agree with HOGEBOOM, J. Judgment affirmed.

Statement of case.

WILLIAM HALLIDAY and W. P. HASKINS, Executors, &c., v.
ERASTUS P. HART and WILLIAM BEACH.

The performance of an unqualified legal obligation by the payment of part of the amount due upon a promissory note, is not a valid consideration for the extension of payment of the remainder, so as to discharge sureties. H. being the holder of two promissory notes made by W.—one for \$1,000 and the other for \$500, both of which were overdue—W. proposed to pay \$400 on the \$1,000 note. H. offered to receive the payment on the \$500 note, and in consideration thereof to extend the time for the payment of the other note. To this proposition W. declined to accede, but finally, at the instance of H., he agreed to apply \$380 upon the \$500 note, and \$70 upon the \$1,000 note. H. agreed, in consideration thereof, to extend the time for the payment of the \$1,000 note, and thereupon the money was paid and applied as H. proposed; in consideration of which, he executed a written agreement to extend the time for the payment of the \$1,000 note, until the first day of October then next. *Held* that in making these payments W. only discharged the legal obligations already resting upon him; and that neither the fact of such payments, nor the appropriation thereof, upon the two securities, furnished any consideration for the agreement to give time for the payment of the \$1,000 note.

Held, also, that the referee properly excluded parol evidence, offered for the purpose of showing that the \$70 was paid as interest on the \$1,000 note; such testimony tending to contradict, vary and alter the written agreement.

Held, further, that it was not competent for indorsers, not parties to the written contract between W. and H., to contradict, vary or alter the consideration expressed therein, by parol evidence.

THIS action was commenced by the plaintiff's testator, to recover of the defendants the amount of a certain promissory note, made by the defendant Wait. It was dated on the 21st of March, 1855, and given for the sum of \$1,000, payable one year from date, with interest thereon semi-annually, to the order of the defendant Sayre, at the Elmira Bank, and endorsed by him, and by the defendants Howe, Hunt and Beach. The referee before whom the action was tried found, as matter of fact, that the plaintiff also held another note made by said Wait, for \$500, dated April 1st, 1855, payable one year from date, and endorsed by James Sayre; which last mentioned note was given on a contract for the

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sale, by the plaintiff to said Wait, of a certain lot of land. That after the note mentioned in the complaint became due, the defendant Howe purchased from the defendant Sayre a note for \$1,100, made by Sayre, dated April 24, 1856, payable three months after date, and endorsed by said B. S. Sayre, and offered the same to the plaintiff's testator in exchange for the note mentioned in the complaint, that being the object for which it was given. That the plaintiff's testator declined to make the exchange, but consented to the request of Howe to hold said note for \$1,100, as collateral security. That, on the 16th day of June, 1856, the defendant Wait paid to the plaintiff the sum of \$400, and, before paying the same, expressed a wish to have it applied on the note mentioned in the complaint, and the plaintiff expressed a wish to apply it on the aforesaid note for \$500, except the sum of \$35, to pay the back interest on the note of \$1,000 (the interest due thereon, on the 21st of September, 1855, having been paid). That it was finally agreed between them that \$70 should be applied on the said note mentioned in the complaint, and the residue, \$330, on the note for \$500. That Wait thereupon endorsed the said respective amounts upon the notes, and drew up a writing which the plaintiff's testator signed and delivered to him, and which was as follows:

"In consideration of seventy dollars to me in hand paid, and endorsed on a note of one thousand dollars, made by B. Wait and endorsed by James Sayre, O. B. Howe, E. P. Hart, and William Beach, dated March 21, 1855, and due one year from date, value received, and interest semi-annually; also, for the payment of three hundred and thirty dollars, and endorsed on a note by B. Wait for five hundred dollars, same date as above, and due on the first day of April, 1856, with interest annually. I do hereby agree to and with the said B. Wait, to extend the time of payment of the said one thousand dollar note until the first day of October now next ensuing, and give possession of

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the house and lot on Second street, said money above-mentioned received of B. Wait; also, to take no advantage of, or sue a collateral note in my hands given by James Sayre and endorsed by B. S. Sayre.

“(Signed)

SELAH HALLIDAY.

“ELMIRA, June 16. 1856.”

He also found that Wait and James Sayre were both insolvent when the said note for \$1,000 became due, and when the above agreement was made; that the sum of \$35, being for the interest due September 21, 1855, had been paid, and that the balance due thereon, with interest and notary's fees, was \$1,077.85. And the referee found, as matter of law, that the moneys so paid by Wait to Halliday were such as were due to him, and such as he had a legal right to have, and such as said Wait was legally bound to pay; that such payment constituted no good or valuable consideration for the agreement, and that consequently said agreement was void, and did not suspend the right of Halliday to prosecute said note, and was no defense to this action. The referee further found, that inasmuch as it appeared that the parties to the agreement had fully discussed and considered the subject of the consideration thereof, and how the \$70 paid on the note in suit should be applied, and fully and carefully stated such consideration in said agreement, parol evidence as to what one or the other had said upon that subject before the writing was executed was not admissible for the purpose of varying or contradicting the same, or changing its legal effect. Judgment was entered for the plaintiff upon these reports, and the same was affirmed at the general term. Halliday died, and his executors were substituted in his place as plaintiffs, and the defendants Hart and Beach appealed to this court.

John H. Reynolds, for the appellants.

I. There was evidence given by the defendants, tending to show that Wait, the maker of the notes, when he made

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the payment of \$400, desired to have the whole amount applied upon the note in suit, but finally consented that \$330 might be applied upon the \$500 note, and \$70 on the note in suit, in consideration of Halliday's agreeing to extend the time of paying of the note in suit, and this evidence the referee rejected in deciding the cause, and this ruling it is submitted, was erroneous.

1. Both notes being over due, Wait had the undoubted legal right to make the payment upon which note he pleased, and the plaintiff could not control it. (*Allen v. Culver*, 3 Denio, 284, 300.)

2. It was not only his right but his duty to make the payment on the large note, and to that extent relieve his endorsers. (*Pattison v. Hull*, 9 Cowen, 747; *Dows v. Morewood*, 10 Barb. 183, 189; *Allen v. Culver*, 3 Denio, 284, 300; *Bridenbecker v. Lowell*, 32 Barb. 11, 22, 23, 24.)

3. And his consenting to waive this right at the instance of the plaintiff, on the agreement of the plaintiff to extend the time of payment of the \$1,000 note was a good consideration for the agreement to extend the time. It was a consideration beneficial to the plaintiff, as the endorsement was made, under this arrangement, upon the note for the payment of which he had the least security.

II. Parol evidence was admissible to show that the agreement to extend the time was made upon a good consideration, and what the consideration was. (*Frink v. Green*, 5 Barb. 455, 58, 59; *McCrea v. Purmort*, 16 Wend. 460, 473; *Goodell v. Pierce*, 2 Hill, 659, 661; *Murray v. Smith*, 1 Duer, 412, 428.)

1. The evidence offered did not contradict the written agreement, or tend to contradict any fact it recited. It tended to supply the consideration which the written agreement wholly omitted to state, and thus to support the contract.

2. If the court below was right in holding that the written agreement did not on its face, state a consideration, then it certainly follows that the evidence was admissible,

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to show that there was a good consideration for a contract which expresses none. (*Goodell v. Pierce*, 2 Hill, 659, 651.)

III. The agreement to extend the term of payment being valid, discharged the endorsers. (*Fellows v. Prentiss*, 3 Denio, 512.)

H. Boardman Smith, for the respondents.

I. By the written agreement the parties applied the \$70 upon the principal of the note in question, and not to the payment of interest in advance. (*Hunter v. Osterhoudt*, 11 Barb. 33, and numerous authorities cited.) The agreement to extend was therefore *nudum pactum*. (*Gibson v. Renne*, 19 Wend. 389; *Miller v. Holbrook*, 1 Wend. 317; *Farrington v. Bullard*, 40 Barb. 512; *Kellogg v. Olmsted*, 28 Barb. 96; *Pabodie v. King*, 12 J. R. 426; *Schroepel v. Shaw*, 5 Barb. 580; *Converse v. Kellogg*, 7 Barb. 590; *Keeler v. Bartine*, 12 Wend. 110.) And the maker waived no right to apply this payment wholly on the larger note, for the reason that he had no such right to waive. He could not compel the plaintiff to receive part payment of either note. But what if he could, the application of the payment upon the smaller note (both notes being past due) was only a payment he was theretofore under legal obligation to make, and the making it upon one note instead of the other was no harm to the maker or benefit to the plaintiff, which the law will recognize as a valuable consideration. (*Tryon v. Jennings*, 12 Ab. 33, and authorities cited; 22 How. 421; 12 Wend. 110.) It was Wait's legal right to apply this same money to the payment of some other creditor. Will it be claimed that a waiver of that right and payment to plaintiff would constitute a valuable consideration for an agreement to extend? (See 1 Parson's Contracts, 363, and cases cited—nss; 2 Parson's Contracts, 130, 131, and note R; 13 Ab. 101.)

II. If, then, the written agreement was *nudum pactum*

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and void, because it applied the payment upon the principal instead of making it a payment of interest in advance, it was not competent to make a valid instrument out of a void one, by parol proof, which varied and contradicted the written instrument. It was not necessary that the agreement should be executed by both parties; its execution by the plaintiff, and acceptance by the maker, was an execution by him also. (16 Wend. 466, 465.) It is important to observe that the referee finds that the parties to the agreement had fully discussed and considered the subject of such consideration, and how the \$70 paid on the note in suit should be applied, and had fully and carefully stated such consideration in the agreement, &c. It can not be said that the parol evidence was competent, because the contract does not specify in terms that the payment should be applied upon the principal, for no rule of law is better settled than that parol evidence is equally as inadmissible to vary the legal effect of a writing as to vary its express terms. (2 Seld. 33; 9 Cow. 747; 5 Wend. 187; 2 Den. 285; 11 Barb. 592; 8 Johns. 189; 14 Wend. 26; 27 Barb. 489; Cowen & Hill's Notes, part 1, 384.)

III. No stand could be made by the defendant's counsel upon this point but for the specious pretense that the evidence was competent to vary the consideration clause of the agreement. The authority principally relied on is the leading case of *McCrea v. Purmort* (16 Wend. 460), in the court of errors. Though the reporter's note of that case reads "the consideration clause of a deed is open to explanation by parol proof," the able and exhaustive opinion of Judge COWEN, marks very clearly the broad distinction between that case and the case at bar. Within that authority this instrument, if valid, created a right (i. e., the right of the maker to the extension), and the expressed consideration "gives effect to the operative words of the conveyance." How then was the parol evidence any more competent than if the stipulations had been inverted, and the instrument had read "in consideration of Halliday's

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agreement to extend time of payment to such a day, I, Wait, agree to pay \$70 upon the principal of this note." Could Wait tender the money before the day named, and disprove the agreement to extend, because it stands in the writing in the position of a consideration clause? The acknowledgment in a policy of insurance and receipt of the premium cannot be contradicted by parol, because such evidence affects the operative words of the instrument. (25 Barb. 192.) So DENIO, J., in 3 Kern. 517, holds, citing authorities, that the consideration clause of a deed of bargain and sale can not be contradicted by parol evidence which will affect the operative words of the conveyance. But an adequate consideration is no more necessary to a deed of bargain and sale, than to an agreement to extend time of payment. And while an ordinary receipt, which is mere evidence of a fact, may be contradicted by parol proof, not so a release, which extinguishes a right, and therefore contains the operative words of a contract. (4 Seld. 402; 5 Duer, 294, OAKLEY, CH. J.) A receipt of wheat in store is not subject to explanation by parol. (4 Hill, 104.) A receipt of a note on account, without recourse, is not explainable by parol. (5 Sand. 568.) The consideration clause cannot be varied by parol, for the purpose of altering the effect of the deed. (*Morse v. Shattuck*, 4 N. H. 229; *Gridley v. Grubbs*, 1 J. J. Marsh, 388-9-90.) See the authorities digested, and the law stated to be that "the consideration clause cannot be varied by parol proof to change the legal effect of the instrument." (Cowen & Hill's Notes, 216, 217, 1,442.) Though otherwise, where the operative words are not sought to be changed. (Id. 1,441 and authorities.) A receipt in the nature of a contract cannot be varied by parol. (Cow. & Hill's Notes, 1,439.) "For the purpose of maintaining the character of the deed, as imported by its operative words, the consideration clause is conclusive." (Cow. & Hill's Notes, 1,451, and authorities cited; 16 Wend. 474, COWEN, J.) In the case at bar the written agreement was not only drawn up by Wait,

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the maker, but the endorsement was made on the note by him, and shows, just what the writing shows, that the talk of applying the \$70 as an advance payment of interest, was abandoned by the parties. The parol evidence offered would be incompetent as contradicting the endorsement, let alone the written agreement. (14 Wend. 116, approved; 4 Seld. 406; *Hard v. Bissell*, 1 Root, 260.)

IV. But concede that the endorsement could be explained by parol, so far as to disprove the payment of the \$70, can it be seriously claimed that parol proof is competent to engraft a special contract upon it as to the particular application to be made of the moneys, when such application is inconsistent with, and directly the opposite of the legal effect of the general endorsement as made, and make the endorsement (by reference) a part of the written agreement, even it would be as completely protected from contradiction or explanation by parol proof as any provision of the contract. And by the inexorable rule of law the evidence must be excluded, when, as here, it is inconsistent with the writing. (6 Barb. 458, and authorities cited; Cowen & Hill's Notes, 1452, 1460, and authorities cited.) Or when it affects the operative words of the instrument. (See authorities before cited.) And the rule rigidly excludes "any other evidence of the language used in making the contract than that which is furnished by the instrument itself. It excludes the colloquium, or oral negotiation, leading to the contract which the parties consummate by the writing." (Comstock, J., 3 Kern. 573; 1 Green. Ev. 316, 321, 277, 282, 297; Cow. & Hill's Notes, 1471, 1473; 1 Metc. [Ky.] 285; 16 W. 474.) In the case at bar we may concede the payment of the \$70 might have been contradicted. That was the fact. But the application which the parties contracted should be made of the money was not the fact, but the agreement, the "colloquium." So in 7 B. Monroe, 73, parol proof was excluded of the application which the parties had agreed should be made of the moneys. It cannot be replied by appellant's counsel that the case is

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subject to any other rule, because he offers the evidence to sustain the instrument rather than destroy it. Parol evidence is no more competent to make a void instrument valid than to make a valid instrument void. In most of the reported cases the evidence was offered to impeach a valid instrument. Hence the language of many cases is, "parol evidence is incompetent to defeat a conveyance," or a "valid instrument," &c. The rule, however, is the same when the evidence is offered to support, as when offered to defeat the written instrument. In 4 Cow. 427, parol evidence was offered to vary the consideration clause, to support a void deed. The evidence was held equally as incompetent as if the evidence had been offered to defeat a valid conveyance. (3 Kern. 517, DENIO, J.; *Watts v. Grove*, 2 Scho. & Lef. 492, 501.)

V. And parol evidence is no more competent for these defendants than for the maker. The very question here is whether Wait, the maker, had a defense which he could successfully interpose as against the holder; and the question of parol evidence is to be determined in the same way as if the action were between the holder and the maker. Besides, parol evidence is incompetent as between the parties and their privies. These defendants are privies of the maker, by well settled rules. (18 N. Y. 463; 15 N. Y. 505; 18 B. 1, 405; Cow. & Hill's Notes, 1442, and authorities cited.)

VI. Nor can the defendants say that the parol evidence was admissible to show that, notwithstanding the writing, the maker could have had equitable relief, by reforming the contract. He would have had no status in a court of equity, except upon allegation of fraud, accident or mistake. But

1. The parol evidence was not offered for any such purpose. No such pretense was made or thought of upon the trial. The right to the evidence was insisted on only as a common law right. If inadmissible at law, but admissible to show an equitable right to reform the writing, the

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but themselves unequivocally upon rejection of the evidence is not (and. 55; 3 Kern. 583, DENIO, J.) have not set up any counter-claim or their answer. Before they could have the parol proof they must have averred which would have been essential in a bill in reform a written agreement. (3 Com. 19, 38, S. J.; Van Sant. Pl. 472; 1 Barb. Ch. Pr. 137; 22 154; 17 Barb. 530.) They must, in a proper manner, give the plaintiff his day in court, when he is called upon (as he was not here) for what he has to say against the granting of such relief. (15 Barb. 365-95.) And until that is done, certainly the referee's rejection of a defense not pleaded would not be subject to review.

3. The proposed evidence would not have established any claim to such relief. The negotiation in reference to payment of interest in advance was abandoned. The endorsement shows it, and the written agreement also, both drawn by the maker of the note. (3 Com. 19, 37; 29 Barb. 597; 10 id. 9; 4 id. 279; 8 id. 537; 9 id. 532.)

4. But concede that this proof offered would have shown a *prima facie* right to relief, it is manifest it might do very great violence to the plaintiff's rights to admit it, for when the defendants seek this relief in the proper formal way, the plaintiff may show, for example, 1st. That he never signed the writing. He was not called upon to dispute it, as the case stood; or, 2d. That the sureties assented to the extension. 3d. That he reserved his right of action against the endorers. (1 Seld. 172.) 4th. That the agreement to extend was procured by connivance with the sureties; or, 5th. Made under a mistake or fraud, as to Wait's solvency, for example; or, 6th. That the endorers were indemnified; or, 7th. That they were not in fact sureties; or, 8th. That the \$70 was received in ignorance of the law, connected with surprise or misplaced confidence. (Willard's Equity, 65-66.) Or, 9th. Under a mutual mis-

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take as to the law. (6 Paige, 189, &c.) Or, 10th. Plaintiff did not know the defendants were sureties. (5 Barb. 378.) Or very many possible reasons, which would in equity prevent the reformation of this contract.

5. But the proof affirmatively shows that Wait and the first endorser were then insolvent. Would a court of equity entertain a bill to reform a contract made under a mistake of law, brought by a bankrupt principal for the only purpose of letting out his sureties, under circumstances such as these? And if that be no more than doubtful, will they let in this evidence to accomplish the same thing by indirection? (13 Wend. 377; 8 id. 194.)

6. Or if the court would entertain such a bill, would it not be upon the primary condition of equitable relief, that the maker, or those for whom he would be acting in such a proceeding, should themselves "do equity" by paying this plaintiff his honest dues.

7. But how can these appellants have any equity or interest in the question of the reformation of this contract. If they had paid the note and sued their principal, could he have defended against them, by proceeding to reform this contract. This is the only question. (1 Seld. 172; 12 Eng. L. & E. 162; 1 Parson's Notes and Bills, 241, and authorities cited; 7 Hill, 250; 10 Paige, 11.) But the referee affirmatively finds that there was no mistake here. And it affirmatively appears that the defendants had security.

VII. But grant that there was accident or mistake here, and of such a character as to entitle the defendants to equitable relief, they must institute a direct proceeding for relief. (*Davy v. Pendergrass*, 5 B. & Ald. 187; Eng. Com. L. 7, p. 62; ABBOTT, CH. J.; *Bulteel v. Parroll*, 8 Price, 467; 2 Am. Lea. Ca. 151.)

VIII. But this written agreement was put in evidence by the defendants, without allegation of fraud or mistake; and having thus offered it themselves, they cannot be allowed to contradict it by parol. "A defendant, after he has introduced paper testimony, cannot contradict it by oral

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proof, when there is no allegation of fraud in the pleadings." (22 Ill. 197.)

IX. If the parol evidence was inadmissible, it is an end of argument, for the defendants must not only establish a valuable consideration, but an agreement binding and operative in point of law. (*Davy v. Pendergrass*, 5 B. & Ald. 187; *Bulteel v. Parroll*, 8 Price, 467; 2 Am. Lea. Ca. 151, in 4th ed. p. 396; 6 Munford, 6; 7 Leigh, 501; 9 Yerger, 52; 3 Mason, 446-453; 7 Blackford, 240.) The extension must be by a valid common law agreement.

X. Granting the evidence was competent, that the \$70 was an advance payment of interest, it was still not a sufficient consideration to sustain the agreement. (*Rayner v. Fussey*, 4 Hurl. & Nor. 861; *Harnsbarger v. Kinney*, 13 Gratt. [Va.] 511; 1 Shep. 202; 5 Wend. 501; 8 Pick. 458; 11 Wend. 319; 10 Pick. 129-1.) But both parties proved upon the trial that the interest was not paid in advance.

XI. But if the interest were paid in advance, and if that be a valuable consideration for this agreement, then the agreement is usurious and void. (*Vilas v. Jones*, 1 Com. 274.) Upon negotiable bank paper the law allows interest to be taken in advance for the benefit of trade. This rule has never been extended further. (2 Cow. 678; 2 Kern. 223.) Could interest for five years be taken in advance or for a shorter time, except under the immunities the law extends over commercial paper? "In a case simply between debtor and creditor, the debt being undisputed and due, and drawing interest, no valid agreement can be made by parol to postpone to a future day the payment of the debt. The debtor's promising to pay interest will be no more than the law will compel him to do. If he agrees to pay more, the agreement will be void for usury." (28 Barb. 96.) And an agreement for usurious consideration is no defense, though fully executed. (See the authorities discussed; 10 Ind. 227.)

XII. The point made, that the complaint states that no part of the principal had been paid, has no force, because

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1. It does not appear, from the papers, that the point was raised upon the trial, as it must have been, to be available here. (18 Barb. 522; 19 id. 665; 14 Abb. 75; 20 N. Y. 61; JOHNSON, J.) It was, at most, a case of variance, which, by section 169 of the code, is not material, unless it has misled, and that must be proved, otherwise it must be disregarded on the trial, and most certainly after judgment. (10 How. 315; 1 Kern. 368; 20 How. 465; Code, sec. 170.)

2. *Per contra*, it does appear affirmatively that it was not made. The application of the \$70 was, in effect, the only point to which their proof was directed on the trial.

3 But: whether this allegation in the complaint was inserted by the pleader from inadvertence, or from a misconception by the plaintiff of the legal effect of the agreement, of which the pleader was ignorant, it can have no effect here. It certainly creates no record estoppel. The judgment is not against the record. No motion could be made in arrest by reason of any inconsistency between this judgment and the pleadings. Nothing can be claimed for it, then, except its asserted effect as evidence.

4. It can have no effect as evidence, because it does not allege any interest was paid in advance, nor indeed at all, but that "no part of the principal was paid." Besides, it is only material allegations which are to be deemed admitted, and a material allegation is one which the plaintiff is bound to prove to make out his case. (5 Sand. 54; 4 Sand. 668; 15 Barb. 400.) This negative allegation was surplusage—no part of plaintiff's cause of action. And an allegation anticipating or designed to "head off" a possible defense (as here that some part of the principal had been paid), is not in place in the complaint, or to have effect as evidence if put there. (36 Barb. 628, BALCOM, J.)

5. But granting that it is a material allegation, and proper in the complaint, its alleged effect as evidence is utterly demolished by the proofs of both parties. The plaintiff disproved it (and without objection), by putting in evidence the endorsed note where the \$70 is applied generally. The

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defendants disproved it by putting in evidence the writing, which shows the parties agreed to apply it upon the principal. Then the "admitted fact" was not a fact, and was so found by the referee, and nothing in law can override the established truth short of a technical estoppel.

6. But suppose this point were made upon the trial, it was the prerogative of the referee to amend the pleadings or to disregard the variance. Indeed, he is commanded to do so by the peremptory language of the code. (Sec. 170.) And at the most it was a matter in the discretion of the referee, and not subject to review upon appeal.

XIII. But it affirmatively appears that the defendants had indemnity for their endorsement, by the note endorsed by B. S. Sayer. And B. S. Sayer (as indeed the law presumes), was responsible. And B. S. Sayer was again indemnified. And having indemnity the defendants are not discharged by the agreement to extend. (12 Wend. 123.)

XIV. The \$1,100 note endorsed by B. S. Sayer, was taken by plaintiff to hold as collateral simply, without any agreement to extend, and constitutes no defense. (5 Barb. 580; 7 Wend. 117, 289; 3 Com. 446; 1 Bos. 411; 36 Barb. 294; 5 Hill, 463; 3 Den. 512; 6 Duer, 294; 13 Wend. 374; Story's Prom. Notes, 536.)

XV. The maker of the note and James Sayre the first endorser, were insolvent before either of the notes became due. All the extension given was for the benefit of the endorsers, and with their assent. They cannot, therefore, avail themselves of this defense. Certainly the plaintiffs' equities are too strong to allow of any violence to those rules of law which enure to their protection.

DAVIES, J. The defendants, Hart and Beach, were the endorsers on the note of the defendant Wait, and they therefore occupied the position of his sureties. He was the principal debtor. Their engagement was that he should pay the note if duly presented to him, on the day

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it became due, and if he did not then pay it, that they, on receiving notice of its dishonor, would pay it to the holder. The only defense set up in this action is that Halliday, the owner and holder of the note in suit gave time to Wait, the maker, for payment thereof after the same became due, without the knowledge or assent of Hart and Beach, the endorsers, and that consequently they have been discharged from their contract created by such endorsement.

If the holder of a note gives the maker further time for the payment thereof, without the consent of the endorsers, he discharges them from all the liability that they contracted by becoming parties to the note. (Per BEST, Ch. J., *Philpot v. Briant*, 4 Bing. 721.) A creditor, by giving further time of payment, undertakes that he will not, during the time given, receive the debt from any surety of the debtor, for the instant that a surety paid the debt he would have a right to recover it against his principal. The creditor, therefore, by receiving his debt from the surety, would indirectly deprive the debtor of the advantage that he had stipulated to give him. If the creditor had received from his debtor a consideration for the engagement to give stipulated delay of payment of the debt, it would be injustice to him to force him to pay it to any one, before the day given. If to prevent the surety from suing the principal, the creditor refuses to receive the debt from the surety until the time given to the debtor for payment by the new agreement, the surety must be altogether discharged; otherwise he might be in a situation worse than he was in by his contract of suretyship. If he be allowed to pay the debt at the time when he undertook that it should be paid, the principal debtor might have the means of repaying him. Before the expiration of the extended period of payment, the principal debtor might have become insolvent. A creditor, by giving time to the principal debtor, in equity destroys the obligation of the sureties, and a court of equity will grant an injunction to restrain a creditor, who has given further time to the principal, from

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bringing an action against the surety. This equitable doctrine the courts of law have applied to cases arising on promissory notes and bills of exchange. (Per BEST, Ch. J., S. C.)

It was formerly held that any absolute and distinct agreement to give the acceptor time was considered as discharging the drawer and endorsers of a bill of exchange, without any distinction whether or not such agreement was founded on a sufficient consideration to bind the party making it; because, at least, the acceptor relying on the honor of the party making it, and that he would abide by it, would naturally relax in his endeavors to pay the bill before the enlarged time, and in the mean time might pay less accommodating holders. (Chitty on Bills, 9th Am. ed. p. 446, and cases cited.) But the same author observes, that, of late, a distinction has been taken and a new doctrine has sprung up, and been acted upon, namely, that even an express agreement not to sue, made after giving notice of non-payment, but *without sufficient consideration*, and without taking any new security, being *nudum pactum*, will not discharge the other parties, and several authorities are cited to maintain this proposition. Among others, the case of *Arundel Bank v. Goble*, decided in K. B. in 1817, which was an action by the endorsee against the drawer of a bill. The plaintiffs were the holders when the bill became due, and duly presented the same to the acceptor for payment, and wrote a letter to the defendant in due time, informing him of the dishonor, but that from the promise of the acceptor they expected the sum would be shortly paid. Afterwards the acceptor applied to them for indulgence for some months. They, in reply, wrote to the acceptor that they would give him the time, but that they should expect interest. The cause was tried on the home circuit before BURROUGHS, J., where it was contended by Nolan and Comyn for the defendant, that the indulgence to the acceptor discharged the drawer, but the jury found a verdict for the plaintiffs. On motion to the court of K. B.

for a new trial, the court held that, as no fresh security was taken from the acceptor, the agreement of the plaintiffs to wait without consideration did not discharge the drawer, because the acceptor might, notwithstanding such agreement, be sued the next instant, and that the understanding that interest should be paid by the acceptor made no difference.

Philpot v. Briant (supra), was an action by a holder, against the drawer of a bill of exchange. The defense was that time had been given to the acceptor, and that consequently, the drawer had been discharged. The plaintiff applied to the agent of the executrix of the acceptor, who said there was not sufficient personal property to pay the bill then, but that if the plaintiff would let the matter stand, the executrix would engage to pay the bill out of her private income. The plaintiff promised, provided the interest was paid, to give a reasonable time, and in pursuance of this agreement, interest was paid out of the private income of the executrix. On a motion for a non-suit, verdict having been taken for plaintiff, the common pleas discharged the rule, holding that the time of payment must be given by a contract that is binding on the holder of the bill; a contract without consideration is not binding on him; the delay in suing is, under such an agreement, gratuitous; notwithstanding such contract, he may proceed against the acceptor when he pleases, or receive the amount of the bill from the drawer or endorser. The case of *Arundel Bank v. Goble, supra*, is cited with approbation, and it is said that case was stronger than the present. The court said: "If the promise made by the executrix of the acceptor, be considered to be a promise to pay the debt with interest, out of the assets of the executrix, it gives no claim to the holder beyond what the bill gave him. The executrix was, before that promise was made, bound to pay principal and interest out of her testator's effects. If it is to be taken to be a personal promise of the executrix, it is void under the statute of frauds, not being in

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writing." The court in its opinion, takes no notice of the fact that the interest was paid by the executrix out of her private income. The interest paid being due, the court must have regarded such payment as in discharge of a legal liability already existing, and that it formed no consideration for the new agreement to give time. It must also have been regarded by the court as an immaterial circumstance, that such payment was made out of the private income of the executrix.

Both these cases are cited by Judge NELSON, with approbation, in his opinion in the case of *Gahn v. Niemcewicz* (11 Wend. 312). In that case a party holding a bond and mortgage, over due, received from the principal debtor his promissory note at thirty days for the amount of the bond and the accrued interest thereon. The surety claimed that the receipt of such note was giving time to the principal, and therefore discharged the surety. It was held that the giving of the note therefor was of no benefit to the creditor, for she already had a higher and better security, and for the same reason it was no injury to the principal. He was already liable for the same amount on his bond. There was, therefore, no consideration of benefit on the one side, or harm on the other, to raise or give effect to the implied promise of delay relied on. The case of *Pabodie v. King* (12 Johns. R. 426), is approvingly cited as containing an apposite illustration of the principle that payment, even, of part of a debt already due, furnishes no good consideration for an agreement to defer a demand of the residue. It was in that case decided that payment of a part of a debt is not a consideration which will support a promise to forbear, because the payment of the surety was doing no more than the party was bound to do.

Upon the facts found by the referee in this case, we see that the debtor, Wait, was indebted upon two separate and distinct notes to his creditor, Halliday. Upon both he had sureties; and no facts are disclosed which show that the endorsers upon the note for \$1,000 had any higher equity for the appropriation of the payment made on the 16th June,

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1856, of \$400, than the endorser upon the note of \$500. Both notes were over due, and Wait, the maker, was legally bound to pay both; not one more than the other. He made the payment of \$400 to his creditor, holding both securities; and, by the agreement made between them at the time of such payment, which was reduced to writing and signed by Halliday, the person to be bound thereby, the payment was distributed and endorsed, \$330 on the note of \$500 and \$70 on the note of \$1,000. From the finding of the referee, we are to assume that there was no other or different agreement in reference to the object of such payment and the appropriation thereof, than what is contained in said paper writing. There is no ambiguity in its terms. In consideration of \$70 paid and endorsed upon the \$1,000 note, and of \$330 paid and endorsed upon the \$500 note, Halliday agreed to extend the time of the payment of the \$1,000 note until October first, then ensuing.

In making these payments, therefore, Wait but discharged the legal obligations already resting upon him; and neither the fact of such payments, nor the appropriation thereof, upon the two securities, furnished any consideration for the agreement to give time for the payment of the \$1,000 note. If the \$70 had been paid as interest on the \$1,000 note, as is contended for by the counsel for the appellants, another and different question would be presented. That amount of interest was not *then* due upon the note, and its payment would have been a pre-payment of interest—the discharge of an obligation before its maturity. Such pre-payment of interest would undoubtedly have furnished a good consideration for the agreement to give time. We are not embarrassed, however, by that question. The fact is distinctly found by the referee, that after a discussion between the parties, Wait, expressing a wish that the whole sum paid should be applied on the note of \$1,000, it was finally agreed that the sum of \$70 should be applied on the note; and it is not found that it was to be applied in payment of interest, and we must therefore assume that it was made as

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a payment, generally, on the note. Upon the facts, therefore, as found by the referee, there can be no doubt that his conclusions of law were correct, and that the plaintiff was entitled to recover.

The question remaining to be considered arises upon the offer of the defendants, and the ruling of the referee excluding the same. The offer was in these words. The counsel for the defendants proposed to show by the witness Wait, the maker of the note, that he requested the plaintiff to apply the whole sum paid on the note in suit, and in consideration that the witness would waive his right to have the same applied on the note in suit, and would allow the plaintiff to apply the sum of \$330 on the \$500 note, and \$70 as interest on the note in suit, the plaintiff agreed to extend the time of payment.

The first objection which presents itself to this testimony is that it is an attempt to set up, by parol evidence, a different agreement between the parties than that contained in the writing produced. This showed the application of the whole sum paid, and that the sums paid and endorsed on each note were so paid on account of the amount due thereon generally, and not on account of interest. This could not be done. The written agreement merged all previous conversations and negotiations between the parties, and must be held to express the true agreement made between them, upon the matters therein referred to. (*Renard v. Sampson*, 2 Kern. 561.)

In *Fellows v. Prentiss* (3 Denio, 512), it was held that if a principal debtor gives the creditor his note for the debt payable on the day after date, the surety is thereby discharged. It was offered to show that the note was intended as a mere memorandum note, giving no extension of credit, and was intended only to fix the balance of the account. This evidence was excluded. The chancellor, in his opinion, says the written receipt and the notes showed that those notes were received in payment of the original account and interest thereon to that date. The circuit judge

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very properly refused to allow evidence to contradict the written statement, and to show that one of the notes was a mere memorandum note, which gave no extension of credit. The referee, therefore, properly excluded the parol evidence offered to show that the \$70 was paid as interest on the note of \$1,000. Such testimony tended to contradict, vary, and alter the written agreement, and was inadmissible. But it is insisted, on the part of the defendants, that it is competent for them to show, by parol, that the consideration expressed in the written contract for giving time for the payment of the \$1,000 note was not the true consideration for such extension, but that the same was the waiver of the right of Wait to have the whole of said payment endorsed upon the note of \$1,000, and his consent to have \$330 of said amount endorsed upon the note of \$500. And it is urged, on behalf of the defendants, that such waiver and consent formed a good consideration for such extension, as such payment was beneficial to the plaintiff; and it is claimed that he had no security therefor. I think it may well be doubted if this would make out a good consideration, upon the facts developed in the referee's report and in the agreement. It would appear that the note for \$500 was given on a contract for the sale by Halliday to Wait of a certain lot of land, and the inference is strong that possession of the land sold was retained by Halliday as security for the payment of the balance of the purchase money. It may, also, be inferred from the language used in the agreement of June 16, 1856, that Halliday there agreed to give up the possession of the lot sold to Wait, and that the consideration for such surrender was the payment of the \$330 on the \$500 note. He would seem to have been paid subsequently thereon the sum of \$110—leaving only due of principal the sum of \$60.

The case of *McCrea v. Purmort* (16 Wend. 460), and the authorities there cited, fully sustain the position that the utmost latitude is permitted to ascertain the true consideration named in a deed, and proof is allowed, to show

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the actual consideration, although it be different in its nature and amount, from that named in the instrument. But Judge COWEN says in his opinion in that case, that enquiry is allowed "whenever that shall become material to a personal action between the parties." That this enquiry is restricted to the parties to the instrument is also apparent from the case of *Murray v. Smith* (1 Duer, 412.) The court in its opinion by BOSWORTH, J. says: "We think the law must be deemed to be well settled in this state, that either party is at liberty to show for any purpose, except to prevent its operating as a valid and effective grant, that its consideration was different, greater or larger than that named in it, and not wholly or at all pecuniary in a suit, by the vendor against the vendee to recover the actual consideration agreed to be paid, or in a suit brought by the vendee against the vendor on the covenants of seizin, or against incumbrances." To the same purport is the case of *Bingham v. Weidervax* (1 Coms. 509.) All of the cases referred to, where the consideration has been enquired into, were between the parties to the instrument, and I have not found a case where such an enquiry has been permitted by persons not parties to the instrument or contract. In *Greenvault v. Davis* (4 Hill, 643), the supreme court held that such enquiry could only be permitted to the parties to the instrument. BRONSON, J. in delivering the opinion of the court, recognizing the rule that the consideration clause is open to explanation by parol proof, observes: "Whatever the rule might be if the question were between the original parties to the deed, the defendant is not at liberty to set up this defense against the plaintiff. The original parties knew of course, what was the true consideration for the grant, but it is not so with third persons. They have no means of knowing what consideration was paid, but from what the parties have said by the conveyance." That was an action on a covenant of warranty contained in a deed executed by the defendant, the plaintiff's grantor. On the trial, the defendant offered to prove that the consideration money,

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paid by Price, the plaintiff's grantor, to the defendant, was less than the amount expressed in the deed. The judge excluded the evidence, and such ruling was sustained by the supreme court.

It follows that it was not competent for the appellants, not parties to the written contract between Wait and Halliday, to contradict, vary or alter the consideration expressed therein, and the testimony offered by them for that purpose was properly rejected.

The ruling of the referee upon such offer being correct, the judgment must be affirmed.

HOGEBOOM, J. The sureties were not discharged. There was no *valid* agreement for the extension of the time of payment. There was no payment of any sum which the party paying was not obliged to pay. The performance of an unqualified legal obligation by payment of part of a sum due upon a note, is not a valid consideration for the extension of payment of the remainder.

The written agreement shows no legal ground for a valid extension of payment. That agreement probably concludes the parties. They have put their contract in writing, and ought to be bound by it.

But even if the parol proof of consideration is admissible, it makes out no valid consideration for the extension of time. It merely shows that the debtor altered his mind about the mode of applying the payments, influenced, it may be, by the persuasions of the creditor, but not surrendering any legal right for any consideration paid. The proof does not come up to the offer. The extension of time was not *purchased* by the change in the application of the payments. If it had been, I am not prepared to say that such a change, where both debts were over-due, would be a sufficient consideration for a valid agreement to extend the time of payment. The judgment should be affirmed.

Judgment affirmed.

Statement of case.

SMITH A. DEWEY, survivor, &c., v. HIRAM G. HOTCHKISS.

After a defendant has availed himself of the plaintiff's books of account, to establish certain credits in his favor, it is competent for the plaintiff to read from the same books charges and entries which show that those credits have been exhausted by counter charges of debit, made at about the same time and afterwards.

The defendant can not use the books to establish credits in his favor, and *uno flatu* deny to the plaintiff the full benefit of the charges therein against him.

He must take the whole or none; and having elected to put the books in evidence, for his own benefit, he cannot afterwards be permitted to deprive the plaintiff of the benefit of any charges therein in his favor.

In such a case it is wholly unimportant whether the whole or any portion of the entries are in the handwriting of the plaintiff.

THIS action was brought to recover a balance for goods sold, arising out of merchants' accounts, part in favor of the plaintiff and Philip C. Wells—the interest of Philip C. Wells in which had been assigned to John Wells—and part in favor of the plaintiff and John Wells. A portion of the demands consisted in charges of cash to the defendant. John Wells died after the commencement of the action. On the trial before the referee, the plaintiff proved accounts, commencing April 27, 1848, and ending September 30, 1851, amounting to \$1,269.72. These accounts were proven by the plaintiff's calling several persons who had been their clerks, and on their examination placed in their hands the day books of said plaintiffs, and proved by said clerks items of charge against the defendant, which were upon said books, fully by recollection independent of said books, and partly by recollection refreshed from said books, and partly by charges in said books, being in the handwriting of said clerks. The plaintiffs also placed in the hands of said clerks a certain other book, called a cash book, and proved by said clerks charges of cash against the defendant upon said cash books, in like manner as they had proved the charges upon said day books. The total

Statement of case.

amount of the plaintiff's account as thus proved was \$1,269.72. The defendant on cross-examination, proved the books so produced to be the books of original entry of the plaintiffs, and proved certain entries upon said books to be in the hand-writing of Dewey, one of the plaintiffs. The defendant then offered to read in evidence from said day-books the said items of credit, amounting to \$152.09, proved to be in the handwriting of Dewey. The same was admitted, and the defendant's counsel then read from said books said items in evidence. The defendant then offered in evidence said cash book for the purpose of proving items of cash which were credited to him on said cash book, and the same was admitted; and the defendant's counsel then read in evidence from said cash book eight items entered thereon of cash credited to said defendant, the first of which bore date July 21, 1848, and the last of which Nov. 19, 1851, and amounting, in the whole, to \$152.09. The plaintiffs' counsel then offered in evidence the day-books of plaintiffs, and to read therefrom in evidence the several charges against the defendant made thereon, which had not been proved by the plaintiffs' witnesses, which were mostly in the handwriting of the plaintiff Dewey, commencing on the 27th day of April, 1848, and ending September 30, 1851, on the ground that the defendant having read in evidence the above-mentioned items from said day-books, the whole of said day-books were made evidence for the plaintiffs, to which the defendant objected, and the referee admitted the same, and the defendant excepted. The items so admitted amounted to \$137.49, and were allowed to the plaintiffs by the referee, who reported a balance due to the plaintiffs of \$299.62, and judgment entered on his report was affirmed at general term. The defendants, thereupon appealed to this court. The cause was submitted on printed points, by

Wm. Clark, for the appellants.

T. R. Strong, for the respondent.

Opinion of DAVIES, J.

DAVIES, J. The only question made is whether the referee decided correctly in admitting the books in evidence on the part of the plaintiffs. This point would seem to have been distinctly disposed of by this court. In the case of *Low v. Payne* (4 Coms. 247), the court said: The rule undoubtedly is that the private entry of the party himself, in his favor, is not available to sustain a charge for cash lent, but only those entries which are made in the regular and usual course of his business. In that case, however, the books comprise a series of entries made in the usual course of business, in the midst of which, at considerable distances apart, are the two exceptionable items. The defendant made no proof, but would appropriate to himself the benefit of the credits appearing in his favor, upon the same books, while he denies to the plaintiff the full benefit of all his charges. The court below were right in the position held by them, that if the defendant would make the books evidence in his favor, he can not do so without taking the whole account together. The accounts are received in that case in like manner as the oral admissions of the party, the whole of which, or none, must be received. The defendant is precluded by it, unless he wholly disproves the items. In the case at bar the defendant availed himself of the plaintiffs' books, to establish certain credits in his favor. Clearly the plaintiff was at liberty to use the same books to show the amount of charges against the defendant, also contained therein. He can not use the books to establish credits in his favor, and *uno flatu* deny to the plaintiff the full benefit of the charges therein against him. He must take the whole or none, and having elected to put the books in evidence for his benefit, he can not be now permitted to deny the plaintiff the benefit of any charges therein in his favor.

In *Pendleton v. Weed* (17 N. Y. 72), upon the trial the plaintiff called a bookkeeper who testified that he had examined the books of the two firms of the defendants, and then referred to certain entries in the ledger, and also

Opinion of DAVIES, J.

in the journal of one of the firms of the defendants. On his cross-examination, he testified that he had examined all their books that contained notes mentioned in the entries referred to would in a regular course of business be entered in the bill book, and that one of the entries referred to a cash book. The witness was then asked to turn to the cash book and read the entry referred to; also to the bill book, and read the corresponding entries in it in regard to the notes. Objection was made, but overruled by the court, and the plaintiff excepted, and the entries were read. The counsel for the plaintiff then called for the books of Rhodes, Weed & Co., the other firm of defendants which were produced, and the bookkeeper read certain entries in the ledger and journal of that firm. On his cross-examination, the witness was permitted by the court, under an objection and exception, to read from the cash and check books of that firm, upon the subject of the payment of the judgment in controversy; the court ruling that the witness might read from any of the books that were kept contemporaneously. In the opinion, concurred in by all the judges of this court except one, upon this point, it is said: The entries which were objected to as evidence, in the books of N. & H. Weed & Co., proved nothing material beyond what had already been proved by the plaintiff; but in regard to all the entries, the reading of which was objected to, both those in the books of N. & H. Weed & Co., and those in the books of Rhodes, Weed & Co., the plaintiffs having given in evidence entries in some of the books of each firm on the question of payment, it was proper to allow the defendants to refer to other entries on the same subject, about the same time, in other books essential to a complete system of bookkeeping then kept and used by those firms respectively. The books of each firm must be regarded as one for the purposes of evidence, and the question is the same as if the entries objected to had been in the same books with the entries used by the plaintiff. If a party uses books of account against his adversary, he makes them evi-

Opinion of DAVIES, J.

dence for him on the same subject. They are like any declaration or admission, by writing or orally; if part is used, the whole relating to the same matter is admissible. In the case now under consideration the plaintiffs' offer was to read from the same books which the defendant had read from. The portions proposed to be read by the plaintiffs related to the same subject matter as the parts read by the defendant, namely, the dealings between the parties. The defendant had read entries forming a part of the plaintiffs' account with the defendant. Other entries, in the same books, containing items of said account were pertinent to a full understanding of the accounts and to their completeness. The defendant had read items of credit to him from the books, and it was clearly competent for the plaintiffs to read from the same books charges and entries, which showed that these credits had been exhausted by counter-charges of debts made at about the same time and afterwards.

No inquiry was or could have properly been made as to the handwriting of the entries in the plaintiffs' books put in evidence by the defendant. The inquiry would have been quite immaterial, as they did not derive their character as evidence from that circumstance, but from the fact that they were found in the books of the plaintiffs in the regular course of their business, and were, therefore, to be deemed and regarded as the acts and admissions of the plaintiffs themselves. It was of no importance, therefore, that the entries offered in evidence by the plaintiffs were in the handwriting of one of the plaintiffs. They were admissible, on the ground that the defendant had put in evidence a portion of the admissions made by the plaintiffs which were favorable to him, and it followed from thence that the plaintiffs were entitled to put in the residue which favored their views. It was wholly unimportant, whether the whole or any portion of the entries were in the handwriting of the plaintiffs, or either of them. The judgment appealed from should be affirmed.

Opinion of HOGEBROOM, J.

HOGEBROOM, J. The plaintiffs' account books, it is conceded, were properly in evidence. In connection with the oral testimony of the clerks, they established the larger part of the plaintiffs' claim. Being in evidence, the defendant availed himself of them to prove thereby credits in his own favor. These were equally well established, whether they were in the plaintiffs' handwriting or not. The plaintiffs had brought them forward as their books, claiming for them authenticity and credit, and could not deny their admissibility and force, even when they operated against themselves.

In using them for his purpose, the defendant apparently travelled over their entire contents, selecting his items wherever he pleased, without reference to dates or subject matter, or their connection or relation to the charges read by the plaintiffs. Thus he selected from the day books three different items, each of considerable amount, of the respective dates of May 2d, 1848, March 22d, 1849, and October 27th, 1849. He selected from the cash book eight different items, ranging between the dates of July 21st, 1848, and November 19th, 1851. He had therefore used the whole of the books indifferently for his purpose. He had taken the entire account between the plaintiffs and the defendant, adopted it for his own benefit, and was not, I think, at liberty to renounce it where it made against him. The books constituted one entire series of accounts between these parties, and, for the purposes of this case, may be regarded as if they contained nothing else whatever—indeed, as if they had all been presented in court by the plaintiffs on a single paper or account current. In such case could the defendant be permitted to cull particular entries from the account and exclude the residue? I think not.

The rule that a party whose oral declarations, in a conversation are improved in evidence by his adversary, is not thereby permitted to introduce in his own favor disconnected portions of the same conversation having refer-

BOON, J.

matters, has no close

be regarded as the single,
ent of the party offering it—
the true state of the business
parties—not necessarily entitled
if discredited by other evidence,
consideration of the jury.

defendant, having adopted the whole
ing through its entire scope and contents,
y to the whole, and has made it necessary
d take in the whole, in order to determine
portions rejected by him bear upon, affect or
portions selected. There is no evidence that
tions of the account introduced by the plaintiff,
those introduced by the defendant, do not materially
ify the effect of the latter items, and do not in fact
late to the same precise subject matter. And we may
presume it to be so, as we can make no intendment against
the propriety of the ruling in the court below.

This court has, in substance, affirmed the propriety of this evidence. In *Low v. Payne* (4 Comst. 248), the plaintiffs' books (properly established by preliminary proof), constituted the only evidence. They contained credits which the defendant insisted upon the benefit of, and the court held him thereby compelled to submit to two charges of cash paid contained in the books, though not properly items of book account. In *Pendleton v. Weed* (17 N. Y. 76), where the books of two different firms had been put in evidence (in part consisting of different members), the court say: "The plaintiff having given in evidence entries in some of the books of each firm on the question of payment, it was proper to allow the defendant to refer to other entries on the same subject." If a party uses books of account against his adversary, he makes them evidence for him on the same subject. They are like any declaration or admission by writing or orally; if part is used, the

Opinion of HOGEBROOM, J.

whole relating to the same matter is admissible." (Cow. & Hill's Notes, 229.)

If it be said this last authority shows that the entries in the different books related to the same subject matter, to wit: the question of payment of a particular judgment, I reply that in this case, the subject matter is the state of the *entire account* between the parties. The parties had made it so by their mode of using the books. The plaintiffs had made the books evidence for themselves of all matters of accounts between the parties. The defendants had selected indifferently and indiscriminately from the mass of materials thus presented to them, all which they supposed tended to their advantage, without reference to their continuity or connection with those proved by the plaintiff. The entire books, with all their entries, had thus come legitimately before the court by the mutual assent of the parties, and they were permitted to cull from them at their pleasure. If we were disposed to take a stricter view of the rights of the parties, there is no evidence that the plaintiffs introduced a single item *subsequent* to those introduced by the defendant.

If these views are correct, the judgment should be *affirmed*. If they are not so, the judgment should not be reversed, but corrected by deducting therefrom the items illegally admitted, amounting to \$137.49.

Judgment affirmed.

Statement of case.

WILLIAM W. NELLIS v. THE NEW YORK CENTRAL RAILROAD COMPANY.

Under chapter 228 of the laws of 1857, which provides that the New York Central Railroad Company, at every station on its road where a ticket office shall be established, shall keep the same open for the sale of tickets at least one hour prior to the departure of each passenger train from such station, but that they shall not be required to keep such offices open between nine P. M. and five A. M., except at Utica and six other stations on its road; and that if any person shall, at any station where a ticket office is established and open, enter the cars as a passenger without first having purchased a ticket, it shall be lawful for the company to demand and receive from him a sum not exceeding five cents, in addition to the usual rate of fare; the extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket office that is open.

If the ticket office is not open, no ticket can be procured, and no right exists to demand the extra fare.

So held where the plaintiff entered the cars of the company, at Utica, as a passenger, at one o'clock A. M., without having first procured a ticket, the ticket office not being then, nor for an hour previous to the departure of the train at one o'clock, open.

And held, that the company, having assumed to demand and receive from the plaintiff five cents, in addition to the legal fare, under these circumstances it "asked and received a greater rate of fare than that allowed by law," and was thus brought within the provisions of the first section of chapter 185 of the laws of 1857, and was liable to the penalty of \$50 mentioned in that section.

Held, also, that in an action against the railroad company, to recover the forfeiture of \$50, it was not necessary that the complaint should set out the various enactments consolidating the several companies which make up the New York Central Railroad Company, so as to show that the latter company is restricted to a fare of two cents per mile for each passenger; but that it was enough to allege that the defendant had been duly organized; that it was entitled to demand and receive of passengers a certain rate of fare, and that it had demanded and received a higher rate.

By chapter 185 of the laws of 1857, it was enacted that any railroad company which shall ask and receive a greater rate of fare than that allowed by law shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same, but it

Statement of case.

shall be lawful and not construed as extortion for any railroad company to take the legal rate of fare for one mile for any fractional distance less than a mile.

By chapter 228 of the same year, it was enacted that the New York Central Railroad Company at every station on its road, where a ticket office then was or might be thereafter established, should keep the same open for the sale of tickets, at least one hour prior to the departure of each passenger train from such station; but they were not required to keep such offices open between nine P. M. and five A. M., except at Utica and six other stations on its road. At these stations the offices were to be kept open between five A. M. and 11 P. M. By the second section of the same chapter, it was provided that if any person shall at any station where a ticket office is established and open, enter the cars of said company as a passenger thereon, without first having purchased a ticket for that purpose, it shall be lawful for the company to demand and receive from such person a sum not exceeding five cents, in addition to the usual rate of fare for the distance such person may desire to be transported.

The plaintiff in his complaint alleges in substance, that the defendant is a corporation duly organized, and that on the 18th May, 1857, at about 1 A. M., the plaintiff being desirous of being carried on defendant's cars from Utica to Albany, a distance of ninety-five miles, and no more, the plaintiff went to the ticket office of the defendant, established at Utica, about ten minutes before one o'clock A. M., the time fixed for the departure of the train from Utica to Albany, to purchase a ticket, by means whereof he could be transported over said defendant's road from Utica to Albany, and was ready and desirous to purchase and pay for the same, the lawful price, but such ticket office was not open, and no ticket could be procured therefrom, and was not open at any time within the hour preceding the departure of said train. That he took his seat in said train at the city of Utica; that soon thereafter the conductor of

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said train, who was the duly authorized agent of the defendants, demanded and received of plaintiff the sum of \$1.95 for his fare, although informed that the office was not open, and a ticket could not for that reason be procured, which the conductor conceded, but nevertheless demanded and received \$1.95 for the plaintiff's fare from Utica to Albany, while the plaintiff insisted it was but \$1.90, and the plaintiff was compelled to pay and did pay \$1.95 for his fare. And that by reason thereof, the said defendant did ask and receive from the plaintiff a greater rate of fare than that allowed by law, to wit: the sum of five cents, and it thereby became liable to pay said plaintiff the sum of \$50.05, and for that sum this action was brought.

The defendant demurred to the complaint, alleging as grounds of demurrer:

1. That it did not state facts sufficient to constitute a cause of action; and

2. That it did not appear by the complaint that the defendant did not keep its ticket office at Utica open at least one hour prior to the departure of each passenger train between five A. M. and eleven P. M., prior to and including the 18th May, 1857; and that it does not appear that the defendant did not keep said office open for the sale of tickets on the 17th May, 1857, from five A. M. till eleven P. M.; nor does it appear that the plaintiff paid any greater rate of fare than that allowed by law.

The demurrer was overruled at a special term in the fifth district, with leave to the defendant to answer on payment of costs in twenty days. If the defendant did not answer and pay costs in twenty days, then judgment was ordered for the plaintiff on the demurrer, with costs.

From this order the defendant appealed to the general term of the fifth district, by which it was affirmed, with costs, and with leave to the defendants to answer on payment of costs. The defendant did not answer, and thereupon judgment was entered for the sums demanded in the complaint, with costs.

Argument for Appellants.

From the judgment, and from the order of the general term, the defendant appealed to this court.

Cox & Avery, for the appellants.

I. In this state the rate of fare on railroads is established by statute at three cents per mile. (Act of April 2, 1850, sec. 28, subdiv. 9; Act of March 27, 1857.)

II. If any facts exist, which in the case of this particular road take it out of the general railroad act (of April 2, 1850), they should have been averred in the complaint. Particularly as the consolidation act is permissive and prospective, taking effect only upon the contingency of consolidation. (Vide sec. 7 of Act of April 2, 1853.)

III. The contingency contemplated by section seven not being averred in the complaint to have occurred, the reduction of fare (to two cents per mile), which was only to take effect upon that contingency cannot be assumed. Consequently the rate of fare *quoad hoc* remains three cents per mile. These, then, are the facts, and this the law before the court. The distance here traveled was 95 miles, which, at three cents per mile, is \$2.85. We exacted \$1.95—less than we were entitled to by 90 cents.

IV. Every issuable fact material to the right of action must be averred in the complaint. (Code. § 142; 13 How. Pr. 220; 2 Duer, 674; 5 Sandf. 566; 3 Seld. 478.) Averments of law (e. g. lawful fare, unlawful, &c.), are insignificant. (13 How. Pr. 35; 14 How. 163, 286; 23 Barb. 575, and cases; 4 Seld. 366.) Upon the merits of this case, when we come to examine them, it will be found, we think that the plaintiff had no action for this penalty. If this court will take judicial notice of the private statute (of April 2d, 1853), authorizing prospectively the consolidation of the several companies named; and also of the fact of such consolidation subsequently occurring, and that this defendant is the result; then we say.

V. We had the right to exact this five cents "in addition

Argument for Appellants.

to the usual rates of fare." Because the party had no ticket. The statute defines defendant's obligations and privileges. (Chap. 218 of Acts of 1857.)

"Section 1. The New York Central Railroad Company at every station on its road where a ticket office is now, or may hereafter be established, shall keep the same open for the sale of tickets, at least one hour prior to the departure of each passenger train from such station; but nothing herein contained shall require said company to keep such office open between nine o'clock P. M. and five o'clock A. M., except at Albany, Schenectady, Utica, Syracuse, Rochester, Buffalo and Suspension Bridge, which shall be kept open as hereinbefore required, between five o'clock A. M., and eleven o'clock P. M.

Section 2. If any person shall at any station where a ticket office is established and open, enter the cars of said company as a passenger thereon, without having first purchased a ticket for that purpose, it shall be lawful for the said company to demand and receive from such person a sum not exceeding five cents in addition to the usual rate of fare," &c.

We are to keep our office open at Utica from five A. M. to eleven P. M. The meaning and extent of the word used in the statute, "established and open," is thus clearly defined in section one of that act. By keeping the office open during those hours, we have our office "established and open," for the purposes of that act. The averment in the complaint, that our office was not open at one o'clock in the morning, does not affect our rights under that statute. According to the view which prevailed in the supreme court in this cause, a passenger taking the train at Utica at half-past eleven P. M., might refuse to pay this five cents (although he had the whole day to buy a ticket), and furthermore the company are liable to the penalty given by chapter 185 (Acts of 1857), for receiving it.

VI. This "Act to prevent extortion," (of March 27, 1857,) was never contemplated by the legislature to be

Argument for Respondent.

applicable to such cases as this. It was passed four days before this act of April 1 (giving us the right to receive five cents). The presumption that upon this occasion we took the five cents because the party had no ticket, is not repelled by anything stated in the complaint; and as against a party seeking to impose a penalty, must be the lawful presumption, for whenever an act can be attributed to a lawful motive, it always is thus attributed. Can it be true that, for an error of judgment in the construction of this act of April 1, 1857, which was intended by the legislature for the benefit and relief of the defendant, the penalty given for a willful offence is incurred?

VII. Because the general railroad law of this state gives to railroad companies, as such, the right to demand three cents a mile for passenger travel, and there is no averment in the complaint to take the case out of that act; and because an error in construing a statute intended for our benefit cannot amount to a willful demanding of "a greater rate of fare," we ask that this judgment be reversed.

Ward Hunt, for the respondent.

I. The defendant had no authority to demand and receive this additional sum of five cents, beyond the legal fare. (Laws of 1857, p. 432-488; *Porter v. N. Y. Central R. R.* 34 Barb. 353.)

1. A ticket office was established for the sale of tickets at the Utica station.

2. It was not open for the sale of tickets at the time of the departure of the train, and had not been at any time during one hour prior to such departure.

3. This sum can only be charged where the ticket office is open at the departure of the train, and the passenger enters the cars without first purchasing his ticket.

(a.) The act does not even say when the office is "so open," or "open as above provided," but simply when "it is open," i. e., "when the office is actually open when the train starts."

Argument for Respondent.

(b.) This is the reasonable meaning of the statute. If the defendant is at the trouble and expense of keeping its office open, and if it gives the plaintiff the means of buying his ticket when he comes to the station to start, the plaintiff should give the defendant this advantage, if it is deemed such, of selling tickets at the office. While, if there is no opportunity so to purchase, the defendant is not entitled to the advantage, and there is no reason why the plaintiff should pay any additional sum.

(c.) The suggestion that if the office is kept open from five A. M. until eleven P. M., the right is then given to exact the five cents on all occasions, is not tenable. It is opposed to the plain language of the provision. It is opposed to its reasonable construction. It is opposed to the universal habit and practice of the country. No man ever expects to purchase his ticket until a reasonable time before the departure of the train in which he is to start. This suggestion requires him to adopt a different system. The subjects of the first and second sections are distinct, and the two provisions are distinct. Section one requires positively that the office shall be open for a specified period on each day. Section two provides that when it is actually open, but without referring to the precise time directly or indirectly, then, if a ticket is not purchased, an additional fare may be charged.

II. The act of the conductor was the act of the agent. He was their agent to demand and receive fares from passengers, and if in so doing he demanded and received too much fare, the act was in the course of his agency, and was the act of the company. (34 Barbour, 353; 14 Howard, 468.)

1. It is so averred and admitted.

2. It must be so in the nature of things. The directors in a body demanding and receiving fare would occupy but the same position as that of the conductor, namely, an agent.

III. The five cents was received "as fare," and not by way of penalty or forfeiture.

Argument for Respondent.

1. It is expressly averred and admitted in the complaint and demurrer, that it was paid and received "as fare."

2. It was so, in fact, and under the law of 1857, p. 488, chap. 228: "It shall be lawful to demand and receive five cents in addition to the usual rate of fare. The fare is fixed at two cents per mile, or any other sum, and in the case spoken of, the fare may be added to "in addition to the usual rate of fare." The fare is added to—is increased—by the sum of five cents. The legal or usual rate from Albany to Utica was \$1.90. If he did not purchase a ticket, the usual rate or \$1.90 became added to or increased, and thereupon "the fare" became \$1.95.

3. There is nothing in the transaction of the nature of a penalty or forfeiture. This law does not require the purchase of a ticket in advance, nor does any other. The plaintiff had as perfect a right, so far as this law is concerned, to enter the cars and claim to be transported without a ticket as with a ticket. The only difference is, that in the one case his fare is \$1.90, and in the other his fare is greater than the usual rate, and is \$1.95. If the plaintiff had borne with him an infectious disease, he would have had no right to be in the cars, and might have been expelled. His expulsion would be in the nature of a penalty. If he had committed acts of violence or indecency, his right to a passage would have been forfeited, and he might have been turned out, or he might have been compelled to pay damages for any injury inflicted. But in the present case, there is no disease, no violence, no indecency — nothing that impairs his legal right. He is merely subject to an additional fare of five cents.

IV. It is averred and admitted that the defendant did "ask and receive from the plaintiff a greater rate of fare than that allowed by law, to wit: the sum of five cents." The defendant intended to do exactly what it did do, to wit: to demand \$1.95 as the fare or price of transportation from Utica to Albany.

Argument for Respondent.

V. The complaint avers all the facts necessary to constitute a cause of action.

1. It is said that the general act allows three cents per mile to be demanded, and no facts are averred which place this company in any different position. (Laws of 1850, § 28, sub. 9.) Certain companies are allowed by law to charge three cents per mile. Certain other companies may be organized, that are permitted to charge only two cents per mile. (Laws of 1853, page 110.) The former might by law have charged \$2.35 from Utica to Albany, the latter could charge but \$1.90 by law. The complaint avers that the conductor charged and received \$1.95 as the fare, and that that was five cents more than the law allowed. In other words, one dollar and ninety cents was what the law permitted to be charged for the fare, and the conductor demanded one dollar and ninety-five cents, and was therein guilty of the extortion condemned by the statute. This is a plain averment that the company was one of those organizations, whose fare is limited to two cents per mile.

2. "It is never necessary to aver matters which the court are supposed to know, and are bound to understand," (3 Coms. 188; 12 Wend. 70; 17 Wend. 88,) as a public statute or the common law, or the geography or public history of the country, or the contents of the almanac. The court takes judicial notice of many things, *e. g.*, of the ordinary modes of transacting commercial business within this state, as of statutes regulating banks and their business, and the ordinary rate of exchange between commercial cities. (10 Barb. 406; 4 Seld. 182.) Also of the ordinary duration of human life. (6 Duer, 633; 20 N. Y. 65.) Also of notorious facts, such as the usual time required for steamers to cross the Atlantic. (3 Sand. Ch. 571; 4 N. Y. Leg. Obs. 259.) The courts take judicial notice of the civil divisions of the state. (6 Hill, 475; 7 Cow. 429.) The court will take judicial notice of the occurrence of Sundays, as that the third day of grace fell

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on Sunday. (7 Wend. 460.) Also that circulating notes of banks are signed by the president and cashier; that deposits are received and paid out by the clerks, tellers and cashiers; that certificates of deposit and certificates upon the face of checks are signed by the same class of officers, or one of them. (26 How. Pr. R. 1; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; 4 Kern. 623.) The court know, therefore, that the act of 1853 was passed, authorizing the ten railroad companies therein named to consolidate into a single company. The court know, also, that that act was accepted and carried into effect, and that the New York Central Railroad Company, extending from Albany to Buffalo, was the result of such consolidation. They know it from general history, from the records of the secretary of state's office, and from legislative recognitions of its existence. Thus the act of 1857, chap. 228, page 488, recognizes the New York Central Railroad Company as extending from Albany to Buffalo, and as having offices at each of these places. It establishes, also, that the New York Central was organized from and by the companies named in the act of 1853. So the act of 1857, chap. 431, page 856, recognizes this New York Central as existing in Cayuga county, and we aver it to be running its cars from Utica to Albany. Also the act of 1862, chap. 120, page 271, directing the highway tax of said road, in the town of Mentz, in the same county, to be expended in a particular manner.

3. It is said that the complaint does not aver that the plaintiff is a way passenger, and that it is only as to way passengers that the charge is limited to two cents per mile. The suggestions already made, answer the objection. The court cannot refuse to know that Albany is the capital of the state, situated on the right bank of the Hudson river, and that Buffalo is a port upon Lake Erie. at the distance of three hundred and fifty miles from Albany, and that Utica is an intermediate point. Way passengers are here distinguished from through passengers, and it is not neces-

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sary, under the most precise system of pleading, to aver that when a passenger traveled from Utica to Albany, he did not, in so doing, travel from Buffalo to Albany.

4. All these objections are to the form of the allegations rather than to the substance. They form the proper subject of a special demurrer, and not a general demurrer.

MULLIN, J. A railroad company is under no obligation to establish offices for the sale of tickets. If ticket offices are not established, passengers must pay their fares to the conductor on the cars. Such a system would throw great responsibility and labor on conductors, cause loss to the company, and be the source of annoyance to the passengers. All these consequences are avoided in a great degree, by the establishment of ticket offices, but the benefit is derived mainly by the company.

When, therefore, the legislature authorized the defendant to demand five cents, in addition to the usual fare, of every passenger not purchasing a ticket at a ticket office before getting on to the cars, the object was to compel, as far as such a provision could compel, travelers to purchase tickets, and thereby benefit the company.

If the law had stopped by giving the power to impose five cents on each passenger not procuring a ticket, it is quite clear that the effect of it would be merely to add five cents to the established fare, because it would be for the interest of the company to embarrass, and as far as possible to prevent the purchase of tickets at its offices.

To prevent such an abuse of a power given for the accommodation of the company, it was provided that the five cents should be exacted only of those who failed to purchase tickets at places where a ticket office is *established and open*.

This provision might be evaded. In order, therefore, to secure the public against liability to imposition, it was further provided that the defendant should keep its offices open one hour for the sale of tickets, prior to the depart-

ure of each passenger train from such station, between certain hours specified in the act.

Had the departure of the train on which the plaintiff traveled from Utica to Albany, at the time of the demand for the fare for which this action is brought, occurred during the hours the defendant's ticket offices are required to be kept open, and the one at Utica was not open, it could not be seriously claimed that a demand for the extra fare would have been justified, or that the penalty would have been incurred. But the plaintiff left at one o'clock in the morning, at which time the defendant was not required to open any of its ticket offices; and it is insisted that because the plaintiff did not do what it was impossible for him to do—to wit: buy a ticket before leaving Utica—he became liable to pay the extra fare. It seems to me, the proposition has but to be stated to be rejected as utterly unsound. To compel a passenger to pay a penalty because the company had deprived him of the power to travel for the regular fare, would be so oppressive and unjust that it would require a positive provision of a legislative act to induce any tribunal to sanction it. The statute is open to no such construction. The extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket office that is open. If it is not open no ticket can be procured, and no right exists to demand the extra fare.

It is urged that the word "open," in the 2d section of chapter 228, means open at the hours ticket offices are required to be kept open by the first section of that chapter. But it is quite clear that the first section was intended to protect the public against any evasion of the duty to afford a reasonable opportunity to purchase tickets, and to relieve the company from keeping its offices open at all its stations during the whole night. The legislature in effect say to the company, you shall keep your offices open one hour before the departure of each passenger train from each station, from five in the morning till nine in the evening, except in the larger towns they shall be kept open till

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11 P. M. If you do this, and if passengers shall neglect to purchase tickets, you may charge each one five cents additional fare. But if your offices are not open you can get only the regular fare.

The Utica office was not open, as admitted by the demurrer, and hence there was no pretense for demanding extra fare.

The five cents which the defendant may charge is in addition to the usual rate of fare. By these words I understand the legislature to mean that the five cents is taken by the company as fare, and not as a penalty for omitting to buy a ticket. The legislature never permits parties to enforce the collection of penalties given by law to themselves. It was proper to permit the defendant to demand a higher rate of fare from one not complying with a regulation of the company than from those who conformed to it.

The complaint alleges and the demurrer admits that the distance from Utica to Albany is ninety-five miles, and that the fare is \$1.90. I am unable to understand how, in view of these admissions, the defendant's counsel can claim that the defendant is entitled to charge three cents per mile, or any other sum greater than two cents per mile. If the law did permit a charge of three cents, it would not help the defendant, after the admission that the fare was, in fact, two cents per mile. For the purposes of this case, we must act on the allegations and admissions in the pleadings, whatever the law may be on the subject. The pleadings make the law, by which the rights of the parties must be determined.

When, therefore, the defendant assumed to demand five cents in addition to the legal fare, it "*asked and received a greater rate of fare than that allowed by law,*" and is thus brought within the provisions of the first section of chapter 185 of the laws of 1857, and is liable to the consequences of such violation of the provisions of the statute.

The defendant's counsel insists that the complaint should have set out the various enactments, consolidating the

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several companies which make up the New York Central, so as to show that defendant is restricted to two cents per mile for carrying passengers over its road. I can perceive no more reason for setting out these statutes than there is for setting out the proceedings by which the several companies consolidated into the Central were incorporated and organized. It is enough to allege that the defendant has been duly organized, and that it is entitled to demand and receive of passengers traveling over its road, a certain rate of fare; and that it has demanded and received a higher rate. The acts of the legislature, and the proceedings of the separate companies, and of the defendant after consolidation, would be the evidence to establish the facts upon which the limitation of the fare which the defendant may charge, depends.

The court by taking judicial notice of these acts and proceedings could not relieve the defendant from the effect of its admission, deliberately made, that the fare was but two cents per mile—though by the act it might be six cents.

The order and judgment appealed from must be affirmed, with costs.

SELDEN and INGRAHAM, JJ., did not sit in the case. All the other judges being for affirmance.

Judgment affirmed.

Abstract of case.

EDWARD BROWN and DANIEL BROWN v. WELLS H. BOWEN.

Where persons are in the actual use and occupation of premises on which mills are located, and they and those under whom they claim have been in possession thereof for a number of years, and an adjoining proprietor erects a dam below such mills, upon the same stream, by means of which the water is set back upon the wheels in such mills, thereby reducing the power thereof and injuring the mills, an action will lie for damages by the mill-owners.

In case of adjoining proprietors of land over which a stream flows, each has the right to use the waters of the stream on his own premises, for any purpose for which it may be legitimately used; and neither has the right by any erection on his own premises to interfere with the enjoyment of the water by the other.

The only exception to this rule is, that where both parties draw water from the same dam, each has the right to continue to use the water, whatever the effect may be on the other; unless such other has acquired by grant or prescription the right to an exclusive use, or to use whenever there is not enough water for both.

The occupant of premises injured by the setting back of water upon the land may recover damages against the wrong-doer, to an amount sufficient to indemnify him for the injury to such interest as he had in the premises.

An action will also lie by the reversioner for the injury done to the inheritance.

Where the plaintiffs, in an action for such an injury, allege in their complaint that they are joint owners of the property, they are bound to prove it.

Where the defendants, in such an action, occupied premises adjoining those in the possession of the plaintiffs, and never made claim to the latter; *Held* that the law would presume the plaintiffs were lawfully in possession, and entitled to recover damages for the injury sustained by them.

Where the plaintiffs, to prevent the defendants from alleging title to the premises, showed that the defendant's ancestor, under whom they claimed, was present when one of the plaintiffs purchased the premises, and that he did not claim that he owned the land, but said he had come to buy it; *Held* that this, although very loose evidence on which to rest an estoppel, was some evidence, and sufficient, had it been submitted to the jury, to support a verdict finding the estoppel.

Where the judge charged the jury that the defendants were estopped from setting up and relying upon their title to the premises as a defence to the action; *Held* that under this charge the jury were not at liberty to consider the question of estoppel as a question of fact, but were bound to consider the case on the assumption that as matters of law the defendants were estopped from asserting title to the premises; and that in this respect the court erred in its charge.

That the question belonged to the jury, and should have been submitted to them as a question of fact.

Facts necessary to establish an estoppel *in pais*.

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In the absence of proof of the effect of the admission on the party setting up the estoppel, it is for the jury to say whether, on the facts, the several essential parts of the estoppel are proved.

Where, in an action to recover damages of the defendants for flooding the water back upon mills in the occupation of the plaintiffs, by means of a dam, it was shown that the defendants and their ancestor had omitted to assert title to the premises in question, although knowing the premises to belong to them, and that the plaintiffs had purchased them, and were making valuable permanent improvements thereon in the belief that they owned them; *Held* that this silence—this omission to assert title—clearly constituted an estoppel, and that no evidence could do away with the force of it.

A new trial will not be granted when it is seen that the facts cannot be changed, and the fact proved is conclusive of the case.

Where the plaintiffs consented to the building of a dam by the defendants on the condition that the work should be so done as not to injure the plaintiffs, but the work was so imperfectly executed that the current of the stream was impeded, and the water did not flow off, but set back upon the plaintiffs' wheels; *Held* that the condition on which the consent was given not having been performed, the consent or license was no longer binding on the plaintiffs, and the dam from that time became a nuisance, and the defendants liable for the injury it caused the plaintiffs.

Held, also, that the consent of the plaintiffs, and rendering aid in the work, could only operate against them by way of estoppel; and that it could not thus operate, because of the express condition on which such aid and assent were given.

THIS action was brought by the plaintiffs, claiming that the defendants, by building a wing dam in the Otselic river, flooded water back upon the plaintiffs' grist and saw-mills, so as to greatly injure them. (Other causes of action were set forth in the complaint, which, on trial, were dismissed by the court.) The defendants denied the complaint, answering separately; the defendant, Wells H. Bowen, in his answer, denying that the plaintiffs had rightful possession of the premises injured, or that they owned the same or had legal title or lawful right to use the same, and claiming that they belonged to the defendants. He also denied the causes of action set forth in the complaint, and claimed that the wing dam complained of was built by the plaintiffs, or by their assistance and consent.

Upon the trial, the plaintiffs, to show their title to the premises in question, gave evidence of a deed of the pre-

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mises from Luther Bowen to Samuel and William Messenger, dated September 14, 1829; second, a deed from Columbus C. Burr to John F. Cooper; third, a mortgage from John F. Cooper to Amos Taggart; fourth, a statute foreclosure under said mortgage and sale to Mark H. Sibley; fifth, a deed from Mark H. Sibley to Edward Brown, one of the plaintiffs, and a warranty deed of one-half of the premises from Edward Brown to Daniel Brown, the other plaintiff. The defendants proved a mortgage from Samuel and William Messenger of the same lands, dated September 14, 1829, to Luther Bowen; a foreclosure of said mortgage, and a sale of said premises to Luther Bowen, April 29, 1834; that Luther Bowen was in possession in 1835 or 1836, and after said foreclosure; that said Luther Bowen was deceased, and that the defendants were two of his heirs-at-law.

Upon the trial, the defendants moved for a non-suit, which motion was denied. The evidence being closed, the defendant requested the court to charge the jury as follows:

1. That no cause of action is found against James K. Bowen, and that he is, therefore, entitled to a verdict. The court refused so to charge, and the defendants excepted.

2. That no cause of action being found against James K. Bowen, or if the jury shall so find, the plaintiffs' cause of action being a joint one against both defendants, fails as to both, and both are entitled to a verdict. The court refused so to charge, and the defendants excepted.

3. That the defendants were not estopped by any acts of theirs, or those from or under whom they claimed. The court refused so to charge, and the defendants excepted.

4. That if the plaintiffs consented to, or assisted in building said wing dam, or if either of them so consented and assisted, the plaintiffs cannot recover in this suit.

5. That if the plaintiffs are entitled to recover at all, it is not in this form of action, but is for the breach of the contract, or directions for the building of the dam. The court refused so to charge, and the defendants excepted.

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6. That the defendants, or either of them, had a right to protect their own banks and keep the water in its natural or former channel, although the same might injure the plaintiffs. The court charged as hereafter stated, and the defendants excepted to the charge as delivered, and also for the court not charging as requested.

The court thereupon charged the jury as follows:

1st. That upon the evidence the jury, (if there was no further evidence than that referred to by the court,) should find in favor of the defendant James K. Bowen.

2d. That if the jury found a verdict in favor of the said James K. Bowen, they might still find one against the other defendant, and that discharging one defendant would not necessarily discharge the other. To which charge, and each and every portion of the same, the defendants excepted.

3d. That the defendants were estopped from setting up and relying upon their title to the premises as a defense to this action, so far as relates to the damages to the mills by the wing dam; to which charge the defendants excepted.

4th. That the defendants, if the waters of the Otselic had within twenty years changed their channel and were injuring their lands, had a right to turn these waters back into their former channel, provided that in so turning them back they did no unnecessary injury to the plaintiffs; but that if, in bringing them back into their former position and situation, they unnecessarily threw back water on to the plaintiffs, they were liable in this action. To which charge, and each and every portion of the same, the defendants excepted.

5th. That under the facts as found in this case, the plaintiffs were entitled to recover for none of the causes of action set up in the complaint, save that for the injury done by this wing dam to the plaintiffs' mills.

Under this charge of the court, the jury found a verdict in favor of the defendant James K. Bowen, and against the defendant Wells H. Bowen, in favor of the plaintiffs, for

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five hundred and fifty dollars. Judgment being entered against the said Wells H. Bowen, upon the verdict, he appealed to the general term of the supreme court, which affirmed the judgment, and he appealed to this court.

B. F. Rexford, for the appellant.

I. The court should have non-suited the plaintiffs.

1. The plaintiff, Daniel Brown, could not maintain the action, as he received his title in May, 1851, after the building of the dam, and so far as back-water was concerned, the defendants were in adverse possession, and the deed to Daniel Brown, so far as said adverse possession was concerned, was void. (2 R. S. 691, § 6.)

2. The said plaintiff having given permission to defendant to build the dam, the manner in which it was built would not amount to a trespass or case, but the action should have been brought upon the breach of the agreement. The plaintiff, Edward Brown, consented to the building of the dam, and if the dam was not built according to the consent, and a different result was produced by the same than was anticipated or agreed upon, no action upon the case or trespass could be sustained.

3. This permission amounted, in law, to a license to the defendants to build this dam. It was built under the observation and with the familiar knowledge of the said plaintiff, even if he did not contribute to its erection. (The burthen of the proof is that he did, in fact, assist in its original erection.) The plaintiffs can not, therefore, sustain an action on the case, which is essentially as for a wrong, for the damages which may have been occasioned by it, at least, until revocation, and this license never was revoked. (*Miller v. Auburn, &c., Railroad Company*, 6 Hill, 61; *Pierrepont v. Barnard*, 2 Seld. 279; *Jamieson v. Milleman*, 3 Duer, 263; *Syron v. Blakeman*, 22 Barb. 336; *Rathbone v. McConnell*, 20 id. 317, and ref.; *Walter v. Post*, 6 Duer, 363, 370, 371; *Wolfe v. Frost*, 4 Sand. Ch.

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91, &c.; *Eggleston v. New York, &c., Railroad Co.*, 35 Barb. 169.)

The defendants, before building the wing dam, procured the consent of the plaintiff then owning the mills, to its erection, and the same was built under that consent, and to his knowledge. This estops him and his co-plaintiff, who afterwards purchased the one-half of the mill property, from maintaining an action for the damages. We have here the three ingredients of an *estoppel in pais*, the consent of Daniel Brown inconsistent with the present claim, the acting by the defendants on the faith of that consent, and that they will be injured by allowing the plaintiff to recover notwithstanding that consent. (*Welland Canal Company v. Hatheway*, 8 Wend. 483; *Dezell v. Odell*, 3 Hill, 221, &c.; *Pickard v. Sears*, 6 Ad. & E. 475; *Plumb v. Cattaraugus Insurance Company*, 18 N. Y. R. 392; *Walter v. Post*, 6 Duer, 371.)

II. The court erred in deciding as a matter of law, that "the defendants were estopped as a matter of law from claiming plaintiffs' premises, so far as the damage had been done to the plaintiffs' mill by this wing dam," and also in refusing to charge as requested, that they were not estopped, and charging that they were estopped. The effect of all these decisions and of this charge was, to instruct the jury that upon this point there was no question for them to pass on—that "as a matter of law," and not as one of fact, or of law and fact, so far as this defense was concerned, the plaintiffs must recover. To warrant such a ruling and such a peremptory charge, "the evidence must either be undisputed or there must be such a strong preponderance that should the jury find against it, a new trial would be granted for that reason." (*Rich v. Rich*, 16 Wend. 676; *Sheldon v. Hudson River R. R. Co.*, 29 Barb. 229; *Crawford v. Wilson*, 4 Barb. 518.) And there is no such undisputed evidence or preponderance of testimony in this case. The evidence shows that Luther Bowen received the legal title to the land by foreclosure of a mortgage, October 3, 1833, and

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that he went into possession of the same afterwards; that Luther Bowen is deceased, that defendants were among his heirs-at-law, and that the wing dam was built in 1850, within twenty years, and before any adverse possession could attach; and the only evidence upon which the estoppel can be predicated is, that Luther Bowen lived there when the premises were bought and improved by the plaintiffs; that one of the defendants had never claimed the land, and that, as the witness James Clarke swears, after the plaintiff Edward Brown had made a bargain for the land, Mr. Bowen came in; that something was said about Mr. Brown having bought it, and Clarke's "impression is, that Mr. Bowen said he came to buy the land," and did not claim to own it.

1. There was here no act or declaration of either Luther Bowen or his heirs which could operate as an estoppel. (*Thompson v. Blanchard*, 4 Com. 310; *Carpenter v. Stillwell*, 12 Barb. 128; *Pickard v. Sears*, 2 Nev. & Per. 491; *Keane v. Rogers*, 9 B. & C. 577; *Green v. Key*, 3 B. & Adol. 313.)

2. An act or admission, to operate as an estoppel, must have been intended to influence the conduct of the party setting them up, and the party must have acted upon them. But in this case, there is nothing to show that Mr. Luther Bowen's statements were intended to influence or did influence the plaintiffs or either of them; on the contrary, they could not have done it, for, as Clarke swears, the plaintiff Edward Brown, had bought the land before this statement of Mr. Bowen, and admissions after the act are never estoppels. (*Pike v. Acker*, Lalor's Sup. 90; *Merrill v. Tyler*, Sel. Notes, April, 1853, page 47; see also *Carpenter v. Stilwell*, 12 Barb. 128; same case, 1 Kern. 74; *Welland Canal Company v. Hathaway*, 8 Wend. R. 480; *Dezcell v. Odell*, 3 Hill, 221.) We say as was said in 1 Kern. 74, there is no room for pretense upon the evidence that plaintiffs in purchasing the property were at all influenced in their actions by the conduct or declarations of the plain-

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tiffs. (And see also *Chautauqua County Bank v. White*, 2 Seld. R. 253.) Bowen had no conversation with either plaintiff before the purchase, and the only evidence that Bowen said anything about the premises after the purchase is in folio 110, in which witness Clarke says: "It is my impression that Mr. Bowen said he came to buy the land." The witness only had an impression that Bowen so said; and it is going quite too far to say, that on such evidence, "as a matter of law," the defendants were estopped from claiming the title to the land. The most that could be claimed for it was, that it was some evidence for the jury. Again, there is no act or admission on the part of Bowen or his heirs, as to the premises besides the building of the wing dam and flowing back the water, except the omission to make a claim for the land. In 1 Story Eq. Jur. sec. 38, it is said: "If a party having a title to an estate should stand by and allow an innocent purchaser to expend money upon the estate, without giving him notice, he would not be permitted by a court of equity to assert that title against such purchaser, at least not without fully indemnifying him for all expenditures." And to sustain this position, *Chautauqua Bank v. White* (6 Barb. 604); *Cawder v. Lewis* (1 Younge & Coll.'s Ex. R. 427), are quoted. The case in Barbour only lays down the familiar principle that if a person, being the owner of property, stands by and sees another sell it as his own without objection, he afterwards will not be allowed to assert his title, and the case itself is reversed. (2 Selden, 236.) In *Cawder v. Lewis*, Lewis was agent for Cawder, and managed his real estate, which adjoined real estate belonging to him, Lewis; and Lewis having the management of said real estate, allowed Cawder to build on his, Lewis' land; and afterwards Lewis recovered from Cawder the land in an action of ejectment. And in an action for mesne profits, Cawder was allowed in equity to set off the value of the improvements. This case is in no way analogous to the present one. Lewis was the confidential agent of Cawder, and good faith and his duty as

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agent, required him to inform Cawder that he was building on his, Lewis' land. It is also said in Story's Eq. Jur. § 388, "a court of equity might go further and oblige the real owner to permit the person making such improvements on the ground to enjoy it quietly and without disturbance." But the authorities quoted do not sustain the position. Some of them are cases of a person standing by and allowing a person to purchase land without disclosing his title; and others are cases in which, after the owner of the title had recovered the land, the person making the improvements was allowed to set off the value of the improvements against the mesne profits, and laying down the same rule, which is laid down in *Putnam v. Ritchie* (6 Paige's R. 390.) And we have been unable to find a case which decides that a person ever obtains any title or right to real estate by making improvements on the same by the mere silence of the real owner, unaccompanied by fraud. (See, on the contrary, *Miller v. Platt* 5 Duer, 272, 279, &c.)

3. The case of *Wendell v. Van Rensselaer* (1 John. Ch. 354) is cited by MASON, J., in the opinion of the supreme court, and will, probably, be strongly relied on in this court. In that case Philip Wendell, in 1792, gave a secret deed to the defendant, covering certain lands, but he retained possession of the same, except certain portions which he sold, until his death in 1808; but after the purchase he sold various portions of the premises as his own, among which was the piece in dispute, and which was held by the plaintiff as a *bona fide* purchaser. It was proved and admitted that the defendant had actual knowledge of some of these sales; that he preserved a studious silence, and gave no notice to these purchasers or to the world of his title. After this he could not be permitted to start up with a secret deed (of itself of doubtful credit), and take the land from *bona fide* purchasers from Wendell. Having, for such a length of time suffered the public to deal with Wendell as the real owner, he could not be allowed to question or disturb any title that had been purchased under

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his tacit assent. We admit that the case was properly decided, but we claim that on the facts it has no bearing on ours. The court below cites a number of other cases. We admit that each of them was well decided; but in each case there was direct evidence of some affirmative act either of omission or commission, under full knowledge, while in our case there is no proof of either. And this distinguishes our case from them all; we have no such clear and cogent evidence as is required to estop us from claiming our land, or that the injuries, if there were any, were committed on lands belonging to us, and not to the plaintiff.

4. Since the registry act, every person buys and makes improvements on land at his peril. The record informs him of the real title, and it requires an affirmative act on the part of the owner of the legal title to give the other any equities.

5. In this case there is no evidence that Bowen knew that the plaintiffs claimed to hold under any title, or knew that they had made any improvements on the land.

6. The opinion of the court on this point is based on an erroneous statement of the facts. Luther Bowen was not present when the plaintiffs purchased; he was not present when the plaintiffs made the bargain, for he came in afterwards; and he did not say, in presence of the plaintiffs, at the time they bought, that he came to buy the land. What he did say was after they bought, and Clarke swears only that his "impression" is he said he came to buy the land, and neither he or Brown swears that Brown was present.

7. As seen above, there is a difference between the facts on which this estoppel is based, and that on which we claim one in point second, *supra*. In this, whatever was said was after the plaintiffs bought; in the other, the wing-dam was not built till after the plaintiffs had given the permission for its erection; in the one the estoppel, as claimed, preceded the act; in the other it followed it; in the one it

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necessarily influenced conduct; in the other it could not have done so. We claim, then, that the evidence, as presented in this case, falls far short of making an estoppel "as a matter of law," or any estoppel whatever, and that therefore the judge erred in so deciding and charging the jury. But if we are wrong in this, and the admissions or conduct of Luther Bowen might, under certain constructions of them, amount to an estoppel, then we claim that they should not have been decided "as a matter of law," or by a direct charge, but should have been submitted to a jury, under the directions of the court. Luther Bowen did nothing whatever to encourage the plaintiff in their improvements on the premises; he only lived near by, and that is all. So far as the purchase is concerned, he was not present when the same was made, and Clarke only gives his "impression" as to what he said. And it will be recollected that neither of the plaintiffs, although sworn in the case, before and after this question came up, claim or pretend that they were in any way influenced by anything that Luther Bowen said, or did, or did not do, or that they would not have bought or improved, if he had taken a different course. We say, then, that this was, at most, a question for the jury upon the evidence in the case; and to be left to the jury to say whether, under that evidence, anything done by the ancestor of the defendants, or by them, was intended to influence the plaintiffs, and whether it did influence them; both of which must concur in order to work the estoppel. (*Dezell v. Odell*, 3 Hill, 221, 222.) This conclusion that these acts relied on were intended to and did influence the defendants was but an inference from the facts proved, none of which facts necessarily (or, as we claim, even presumptively) proved it. In such a case the rule undoubtedly is, that the question is to be left to the jury. And per COLLAMER, J: "It may be proper for a court to instruct a jury to find for a plaintiff if the evidence is believed when there is no conflict of evidence, and it directly proves the fact in issue, or when the fact is a necessary and invariable infer-

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ence of law from what is proved. But if there be any conflict in the evidence, or if it only shows facts from which the main fact is to be presumed or inferred by the jury, the case should be left to the jury, under proper legal instructions." (*Lindsay v. Lindsay*, 11 Vermont, 626.) This rule clearly makes this question of estoppel, under the facts of our case, at the most, one for the jury, and certainly not one "as a matter of law" as held at the circuit. The rule is so held in cases of estoppel *in pais* by the courts. Thus, in *Welland Canal Company v. Hathaway* (8 Wend. 483), Justice NELSON, in speaking of them, says: "Such estoppels cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel, under the direction of the court." In *Carpenter v. Stillwell* (12 Barb. 136), Justice BARCULO, after referring to the rule, in *Dezell v. Odell* (3 Hill, *supra*), says: "Tested by this rule, we think that the facts of the case, which were proposed to be submitted to the jury, as the basis of an estoppel, ought to have been submitted." See the same case in the court of appeals, in 1 Kernan, 73, 74, and 79, where the question is treated as one for the jury, and the rules laid down by the court as to what must exist to constitute an estoppel, show that none existed in this case. In *Thompson v. Blanchard* (4 Com. 309), the court per JEWETT, J., says: "There is, I think, another principle which would protect Blanchard from liability to the plaintiff for the value of the clothes which he, in good faith, purchased of Wheeler; if the jury, upon the evidence, should find the facts to authorize its application, &c. It is this," and the judge follows by stating the rule of estoppels, quoting, with approbation, the case of *Pickard v. Sears* (6 Adolphus & Ellis, 469; S. C. 2 Nev. & Perry, 488.) In *Thorn v. Bell* (Lalor's Sup. 436 and 437), it is said, in regard to a state of facts much like ours in principle, from which an estoppel was claimed: "This is a proper question for a jury; the defendant's letter is evidence against him, but by no means conclusive. It can go to the

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jury," &c. (See also *Hostler v. Hays*, 3 Cal. 302; *Landis v. Landis*, 1 Grant's Cases, 249.) From these cases, and those cited in them, we think the rule is clearly deducible that in such cases of estoppel *in pais* the question is not to be decided "as a matter of law," but is, at the most, to be left to the jury, like all other questions of fact, with such instructions as the particular case may require, and that in cases much stronger than ours the decision has been that the evidence "was not sufficient to warrant the judge in directing the jury to find a verdict for the plaintiff," and that "if the plaintiff had insisted, it was only some evidence to go to the jury on that question." (*Lewis v. Woodworth*, *supra*.) But the judge, in this case, in three different rulings, held the contrary, and those decisions, as we claim, are erroneous. It cannot be said that this point is unavailable, for the reason that we did not ask to go to the jury on the question, for the judge himself held that it was not for the jury at all, but was "a matter of law," and it is to this that we except. A similar question arose in *Traynor v. Johnson*, 1 Head (Tenn.), 51, and it was held that "where, on an equivocal state of facts, the court instructed the jury, as a conclusion of law, that there was a waiver, the judgment should be reversed on error." This, in principle, covers our case. A similar ruling was made in *Lewis v. Woodworth*, *supra*, and a new trial was granted, though there was no specific request to go to the jury.

III. The court, for the reasons set forth in the last point, erred in refusing to charge that the defendants were not estopped. There was no proof that the ancestors of the defendants had influenced, or intended to influence, the conduct of the defendants. In such a case there is no estoppel. (*Dezell v. Odell*, 3 Hill, and other cases, *supra*; also *Lewis v. Woodworth*, *supra*.)

IV. The court further erred in refusing to charge that "if the plaintiff consented to, or assisted in building said wing-dam, or if either of them so consented and assisted,

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the plaintiffs cannot recover in this suit." This proposition was based on an abundance of testimony in the case, and has reference to the dam as it was actually constructed, and needs no authorities to support it; several having direct reference, however, to it, are found in point first, and sustain our exceptions. (See also *Dorrance v. Simons*, 2 Root, 208; *Stevens v. Stevens*, 11 Metcalf, 251.) For this reason alone a new trial should be granted. It cannot be contended that there was no refusal to charge, as here requested, nor any exception to the refusal. It is true that there is no such statement at the close of the request, nor was it necessary, when it appears that there was no such charge made as was requested, and it is stated that the defendants excepted not only to the charge as delivered, but "also for the court not charging as requested." Now it is clear that this request was made. The charge is given in the bill; this proposition was not charged; there is no pretense that the charge embraced more than is contained in the bill; on the contrary, it is expressly stated that the court "charged the jury as follows," meaning that the charge as printed is the whole of it, so that here is a clear case of the court not charging as requested in this fifth proposition; and it is as clearly stated that we excepted "for the court not charging as requested." And it is the height of hypercriticism to say that this refers only to the request in the sixth proposition; the exception, by its natural construction and meaning, is to all the refusals to charge; the sentence says we excepted to the charge as delivered, that is to the whole of it, and not to any one point; and for not charging as requested, that is to all the omissions or refusals, and not for any one of them. It is certain that we made this request; it is equally certain that the court did not charge the proposition (but did charge the reverse, under our exception), and as certain that we excepted "for the court not charging as requested." We do not think this court will, by any technicality or constrained construction, deprive us of our exception, but

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looking at the question in a common sense manner, will say that it sufficiently appears that it was taken, and we are to have the benefit of it.

D. Pratt, for the respondents.

I. No regular deduction of title from the original source of title was made by either party upon the trial. As a simple matter of evidence, it is submitted that the preponderance was against the claim of title set up by defendant.

1. Although Luther Bowen, the ancestor of defendant, had the prior possession, yet he went out of possession as early as 1835, and never afterwards claimed any interest in the premises upon which plaintiffs' mills were built.

2. Burr went immediately into possession, and he and those holding under him have been in possession ever since.

3. The defendant, also occupying adjoining premises, had never, until the trial, claimed any title or interest in the premises or water privilege, but on the contrary, according to his own testimony, he claimed the right to shut back the water, because the plaintiffs consented, as he alleged, to the building of the dam.

4. The defendant was not, therefore, precluded by the ruling of the court from claiming the benefit of a clear and admitted title to the premises, but was simply deprived of the benefit of an inference to be drawn from the possession of his ancestor.

II. The issue was not one bringing the title directly in issue. It could only come in question collaterally, as bearing upon defendant's liability for flowing the plaintiffs' land, and thereby injuring their mills.

1. An equitable estoppel may be properly applied in one form of action, and not in another, although, brought under the same circumstances and growing out of the same transaction. For instance, a party may be estopped from sustaining trespass, when he could not be from sustaining ejectment. (*Dewey v. Bardwell*, 9 Wend. 65.)

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2. In this case, the question is not whether the defendant might not sustain ejectment, but whether the plaintiffs, having had the peaceable possession of the premises, and built valuable mills thereon, the defendant can indirectly destroy them, and then avoid liability by setting up an interest in himself in the property.

3. Indeed, it is doubtful whether such a defense is available at all under the circumstances, even if the question of estoppel were wholly waived. Suppose the heirs—and there seem to be at least three—should bring ejectment and recover, could the plaintiffs escape liability for mesne profits, by showing injury to the premises by the wrongful action of one of the heirs.

III. It is submitted, therefore, that, taking into consideration the proof of title as it stood when the question of estoppel was raised, and the purpose for which the claim was made on the part of the defendant, the ruling of the court was clearly right, in holding the defendant estopped “from claiming the plaintiffs’ premises, so far as damages to the mill by the wing dam” was concerned.

1. The evidence was sufficient to estop him, had the question arisen upon the direct issue of title in an action of ejectment.

(a.) The premises, when the plaintiff purchased, had been held under a claim of title some eight years by the vendor and those under whom he held, without question or challenge by Luther Bowen.

(b.) At the time of the purchase by the plaintiff, and before the conveyance was executed, Luther Bowen, the pretended owner, was present, and was informed that the plaintiff, Edward Brown, had made a bargain to purchase, and he made no claim of title to himself.

(c.) He lived in the immediate neighborhood from that time to his death in 1850, witnessed the erection of expensive buildings upon the premises, and never intimated any claim to them. •

(d.) The defendant at the same time occupied adjoining

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premises, and never, for anything that appears, made any claim, until the trial, of any interest in the premises occupied by the plaintiffs.

2. It therefore comes clearly within the cases holding that where a person looks on and suffers another to purchase and expend money on land, without making known his claim, he will not afterwards be permitted to assert title against such innocent purchaser. (*Wendell v. Van Rensselaer*, 1 John. Ch. 344; *Storrs v. Barker*, 6 id. 166; *Lee v. Porter*, 5 id. 268; *Niven v. Belknap*, 2 John. 573; *Town v. Needham*, 3 Paige, 545; *Dougrey v. Topping*, 4 id. 94; *Lowry v. Tew*, 3 Barb. Ch. 407; *L'Amoureux v. Vischer*, 2 Com. 278; *Thompson v. Blanchard*, 4 id. 303; 2 Dever. 179; 4 id. 472; 10 B. Monroe, 261; 10 Ad. & El. 90; 6 id. 469; 11 N. Hamp. 201; 3 S. & R. 278; 2 Maryland, 380; 28 Maine, 127; 14 Mass. 437; 4 Barr, 193; 17 Conn. 355; 2 Smith's Leading Cases, 660.)

3. It does not come within the principle that the party must have intended to mislead, or that the other party must have relied upon his admissions, but upon the broader and more enlarged equity, "that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent." (Per THOMPSON, Ch. J., *Niven v. Belknap*, *supra*; Roberts on Frauds, 130; 1 Fonblanque's Equity, 161.)

4. The cases cited would warrant an estoppel, if, as before suggested, the issue had been a direct one upon title in an action of ejectment; but in a case like this, where the title arises only incidentally and is asserted only to avoid responsibility for damages which the plaintiffs actually suffered at the hands of the defendant, there can be no question.

5. The objection which was taken for the first time upon appeal, that the question should have been submitted to the jury, can not be sustained.

(a.) The facts upon which the estoppel was based were

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not disputed. Whether Bowen did or did not say, at the time of the purchase, that he came to buy the land, was entirely immaterial. The important question was: Did he know that the plaintiff was about buying the land, and thus knowing, allow him to complete the purchase without making any claim of interest in himself?

(b.) The effect of an estoppel being the exclusion of testimony, its existence must be a question of law for the court, and not for the jury. (5 W. & S. 209.)

(c.) If the facts are disputed, they should be submitted to the jury, but no exception will lie, unless the court be asked to submit the questions of fact. (*Winchell v. Hicks*, 18 N. Y. 558.)

(d.) In this case the defendant not only did not ask to have the facts submitted to the jury, but the exceptions, both during the trial and to the charge were not calculated to raise or suggest to the judge any such question.

(e.) An exception, to be available, must present the distinct point to be passed upon to the court alone, and in distinct propositions. (5 Seld. 463; 3 id. 266; 2 Kern. 313; 1 id. 161; 28 Barb. 157.)

6. An equitable estoppel is available in an action at law.

(a.) Courts of law have long applied the principle to actions concerning personal property, and there is nothing in the nature of real estate which should deprive it of the benefit of those salutary principles which are constantly applied by courts of law to other kinds of property. Protection against fraud is equally necessary, whatever be the interest at stake. (2 B. Monroe, 254; 22 Wend. 67, 378; 17 Conn. 345; 4 Barr, 193; 14 Mass. 437; 28 Maine, 127; 2 Smith's Leading Cases, 651.)

(b.) Under the code the old distinction between the forms of action at law and in equity, are abolished, and it is the constant practice sanctioned by this court, for parties to avail themselves of equitable defenses to actions at law, or equitable answers to legal defenses.

IV. The objection made upon the trial that the plaintiffs

consented to the construction of the wing dam was not sustained. The legal presumption is that the jury found in favor of the plaintiffs' version of the matter, and that was that they consented to the construction of the dam, if no water should be shut back to the injury of the plaintiffs.

1. The defendant had the right, without any consent, to build a dam upon his own land, provided he did not flow the water back to injure riparian owners above.

2. It would be strange that the plaintiffs' consent for the defendant to do just what he had the right to do, without it, would enlarge that right.

3. Besides, it does not appear that the dam necessarily caused the water to flow back. It does not appear that by clearing out and widening the channel the back flow would not be entirely obviated.

4. Moreover, there is no exception to the refusal to charge according to the fourth proposition, and the charge, as given upon that point, was quite too favorable to the defendant.

V. The remaining exceptions taken on the trial are so palpably frivolous that it is not deemed necessary to notice them.

MULLIN, J. The plaintiffs at the time of the erection of the dam by the defendant, were in the actual use and occupation of the premises, on which the mills in question were located, and they and those under whom they claimed, had been in possession of the same for quite a number of years prior to the erection of said dam. It was proved that the defendant erected the dam, and that by means of it the water had been set back upon the plaintiffs' wheels, thereby reducing the power thereof, and injuring the plaintiffs' mills. It cannot be denied that if these were the only facts in the case, the plaintiffs would be entitled to recover. Each of the parties had the right to use the waters of the stream on his own premises, for any purpose for which it might be legitimately used, and neither had the right by

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any erection on his own premises to interfere with such enjoyment to the prejudice of such other. (Angell on Water-Courses, § 340.) The only exception to this rule, that now occurs to me, is that where both parties draw water from the same dam, each has the right to continue to use the water, whatever the effect may be on the other, unless such other has acquired by grant or prescription, the right to an exclusive use, or to use whenever there is not water enough for both.

The learned author says (§ 340, cited *supra*): The maxim *sic utere tuo*, &c., applies as well to setting back the water of a watercourse above the owner's land in the natural channel of the stream, as it does to an actual overflow of land. * * * No single proprietor without consent, has a right to make use of the flow in such manner as will be to the prejudice of any other, and that he has no more power to apply it to a purpose which occasions a return of the water on the land above, than he has to cause a diminution of the quantity below. He cannot alter the level of the water either where it enters or where it leaves his property.

BAYLEY, Justice, in *Saunders v. Newman*, says: If a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action.

Any impediment, say the supreme court of Pennsylvania, in the stream caused by the defendant's dam, by which the plaintiff's mill is stopped from grinding in any state of the water, or is made to grind slower or worse than it otherwise would, is an injury for which the plaintiff would be entitled to damages. But it is unnecessary to cite authorities; the principle has been recognized too long to admit of controversy at this day.

The acts done by the defendant being *prima facie* actionable, it is necessary, in the next place, to ascertain whether the plaintiffs could, under the circumstances, maintain an action for the damages resulting from the injury. Before

the code, the remedy of the injured party was by an action on the case. (Angell on Water-Courses, § 395.) That form of action could be maintained by his tenant in possession, and by the landlord or reversioner. (Same section.) Title was not necessary, unless the plaintiff sought to recover full damages for the injury to his property. From the very nature and necessity of the case, a temporary occupant must be entitled to sue; and as such occupant could only recover damages sufficient to compensate him for the injury sustained, an action must also be given to the reversioner, or the party sustaining perhaps the largest amount of damages would be left remediless.

It follows that the plaintiff would be entitled in this case to damages to an amount sufficient to indemnify for the injury to such interest as he had in the premises. But the plaintiffs in their complaint allege that they were joint owners of the mills, and they were bound to prove it. Possession is *prima facie* evidence of ownership of real estate. In 1 Cowen & Hill's Notes, 353, it is said: "The mere possession of property, however recent, will enable the occupant to recover or defend against a stranger in ejectment, trespass," &c.

But the defendants showed title in their ancestor subsequent to the deed from their ancestor to Messenger, and no title is shown out of him. It appears, however, that several persons were in possession after Luther Bowen left possession in 1835, and before the defendants went in. The defendants occupied the premises adjoining, and never made claim to the premises occupied by the plaintiffs. Under these circumstances, it seems to me that the law will presume the plaintiffs lawfully in possession, and entitled to recover damages for the injury sustained by them.

The plaintiffs, to prevent the defendant from alleging title to the premises, showed that the defendant's father was in the office at the time Edward Brown, one of the plaintiffs, purchased the premises on which the plaintiffs' mills are located, and something was said in presence of

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Bowen, about Brown having bought the land. The witness's impression was that Bowen said he had come to buy the land; he did not claim that he owned it. This is very loose evidence on which to rest an estoppel; but it cannot be said that it is not some evidence, and sufficient had it been submitted to the jury, to support a verdict finding the estoppel. The court was not requested to submit the question to the jury, and at the close of the plaintiffs' case, and after the defendant had put in their documentary evidence, "the court decided that as the evidence then stood, the defendants were estopped as matter of law from claiming the plaintiffs' premises, so far as the damage had been done to the plaintiffs' mills by the dam." To which ruling the defendants' counsel excepted. At the time this decision was made, no question could be submitted to the jury; the defendants had not as yet given any parol proof, and I cannot discover that the learned judge decided anything. It was an intimation to the defendants' counsel that if they did not give evidence that would do away the plaintiffs' evidence on the subject of estoppel, he would hold them estopped. The direction affected the rights of neither party, and unless the question is presented again in some other part of the record, the defendant must fail in attacking the judge on this branch of the case. But the judge did charge that the defendants were estopped from setting up and relying upon their title to the premises as a defense to the action; to which charge the defendants' counsel excepted.

Under this charge the jury were not at liberty to consider the question of estoppel as a question of fact. They were bound to consider the case, on the assumption that as matter of law, the defendants were estopped from asserting title to the premises. In this the court erred. The question belonged to the jury, and should have been submitted to them as a question of fact. But the defendant acquiesced in its being withheld, but insisted the instruction was wrong as a legal proposition. There was no dispute about the facts, and ordinarily it would be a question of

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law whether the facts proved, established the proposition to establish which they were proved. And it was due to the court that his attention should have been called to the distinctions, if any, which made it peculiarly proper to submit the question whether or not an estoppel was proved to the jury. To establish an estoppel *in pais*, it must be shown: 1st. That the person sought to be estopped, has made an admission or done an act, with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposed to give, or the title he proposes to set up. 2d. That the other party has acted upon, or been influenced by such act or declaration. 3d. That the party will be prejudiced by allowing the truth of the admission to be disproved. (*Plumb v. Cattaraugus County Mutual Insurance Company*, 18 N. Y. 392.) In the absence of proof of the effect of the admission on the party setting up the estoppel, it is for the jury to say whether on the facts the several essential parts of the estoppel are proved. It is quite probable that had the attention of the court been so called to the reasons why in this case the question should be given to the jury, he would have submitted it to them, as I think it was proper for him to do.

It would seem that the attention of neither court nor counsel was drawn on the trial to the important estoppel that was proved in the case. Which was, the omission by the defendants and their ancestor to assert title to the premises in question, although knowing the premises to belong to them, and that the plaintiffs, or one of them, had purchased them, and was making valuable permanent improvements thereon, in the belief that they, and not the defendants or their father owned them. That this silence—this omission to assert title—constitutes an estoppel, there can be no dispute. (*Wendell v. Van Rensselaer*, 1 J. C. R. 344; *Town v. Needham*, 3 Paige, 545; *Storrs v. Barker*, 6 J. C. R. 166; *Thompson v. Blanchard*, 4 N. Y. 303.)

No evidence can be given that can do away with the

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force of the estoppel, and a new trial will not be granted, when it is seen that the facts cannot be changed, and the fact proved, is conclusive of the case.

Unless some error can be found, other than the omission to submit the question of estoppel to the jury, the judgment should be affirmed.

If the defendants were estopped, then the plaintiffs were entitled to damages as owners of the premises.

The appellants' counsel moved for a non-suit on five grounds.

1. That no cause of action had been proved against James K. Bowen, and he should be discharged.

2. A joint action for the matters sued for cannot be sustained, even though separate actions might be brought.

3. The deeds under which the plaintiffs claim are void, because Luther Bowen or the defendants were in the adverse possession.

4. There is no evidence that the plaintiffs' deeds cover the premises in question.

5. The plaintiffs gave permission to building the dam, and cannot, therefore, maintain trespass or trover.

The motion was overruled, and the defendant's counsel excepted.

But two of these grounds are relied on by the appellants in this court. Those are the 2d and 5th, and these alone require attention.

1. Edward Brown is the person who made the purchase of the premises some time prior to 1847, and went on and improved them by erecting buildings thereon. In 1847, he sold half to the other plaintiff, and from that time they had been in partnership. In 1850, the wing dam in question was built. It was by means of that erection the plaintiffs were damaged. It is a mistake, therefore, to say that the plaintiffs did not jointly sustain injury. There was no separate injury.

2. That the dam was built with the consent of the plaintiffs.

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It is true the dam was built with the assent of the plaintiffs, and it is quite probable one of them may have aided in the work. But it is to be borne in mind that the defendants needed no consent from the plaintiffs to authorize them to build a dam on their own side of the river on their own land, provided that such dam caused no damage to the plaintiffs' property. If a temporary suspension of the mills was necessary in order to enable the defendants to perform the work, the plaintiffs' consent would be needed. If the defendants proposed to so build the dam as to set the water back on the plaintiffs' wheels, it is difficult to comprehend why the plaintiffs should not only consent to the erection of the dam, but aid in the work, without consideration or even a motive for so doing. The probability is, and the jury have found the fact to be, that the consent and aid of the plaintiffs were given on the condition that the work should be so done as not to injure the plaintiffs. There would not seem to be any difficulty in so doing it, had the defendants been disposed to so do the work. By clearing out the new channel into which the water was thereafter to flow, back water could have been as effectually prevented as by continuing it in the old channel. The work of clearing the new channel was only partially carried out, and the result was as might have been anticipated it would be; the current was impeded, the water did not flow off, and, as a consequence, set back on the plaintiffs' wheels. It is quite obvious, also, that the mischief would be constantly aggravated. The earth and stone brought down by the current would have a tendency to deposit itself as soon as the force of the current was lessened, and thus in a short time the bed of the stream filled, and the injury from back water permanently increased. The condition on which the consent was given not being performed, the consent or license was no longer binding on the plaintiffs, and the dam from that time became a nuisance, and the defendants liable for the injury it caused the plaintiffs.

It is said that the remedy of the plaintiffs is an action

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for breach of the agreement by the plaintiffs to so build the dam as not to injure the plaintiffs. Technically there was no such agreement; although, doubtless, the law might imply one if it was necessary to prevent injustice, but the parties did not understand that the rights of either party rested in agreement. The acts and assent of the plaintiffs might be considered a parol license on condition, which condition has never been performed, and hence the license fails. But the facts proved do not even make a case of parol license. A licence is a bare authority to do a certain act, or series of acts, upon another's lands without possessing any interest therein. (Angell on Water-Courses, § 285.)

The consent, then, of the plaintiffs, and rendering aid in the work, can only operate against them by way of estoppel; and it can not thus operate, because of the express condition on which such aid and assent were given. It seems to me, therefore, that the non-suit was properly refused.

If the foregoing views are correct, they dispose of all the questions presented by the appellant's counsel.

My conclusions then are:

1. That on the evidence the plaintiffs are owners of the mills in question.

2. That by the wrongful acts of one of the defendants, injury has been done to said plaintiffs.

3. That if, on the evidence, ownership by the defendants is proved, yet the plaintiffs are entitled to recover on their presumed lawful possession of the mills, even if such possession is to be presumed to be as tenants of the defendants.

4. But the defendants are estopped from disputing the ownership of the plaintiffs, by reason of their omission to assert title to the lands, knowing that the plaintiffs were acquiring title to them and making expensive improvements thereon, as owners, in ignorance of any claim thereto by the defendants.

5. That the foregoing ground of estoppel is so clearly

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established, and so conclusive on the defendants, that it would be useless to send the case back for a new trial.

6. But if the judges are of opinion that the case must rest here on the ground of estoppel taken in the court below, and that the others not being suggested, these cannot be considered here, then I am of the opinion that although technically it was the duty of the defendant to have requested the court to submit the question of estoppel to the jury, yet the evidence is so slight on the question that I would be in favor of ordering a new trial on that ground alone.

7. Not discovering any answer to the other ground of estoppel, I am in favor of affirming the judgment, with costs.

All the judges concurring, judgment affirmed.

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WILLIAM ROACH v. THE NEW YORK AND ERIE INSURANCE COMPANY.

A condition, annexed to a policy of insurance, that no suit or action against the insurers, for the recovery of any claim upon the policy, shall be sustainable in any court of law or chancery, unless commenced within six months next after any loss or damage shall have occurred, is valid; and if an action is not commenced within that time it will be barred.

APPEAL from a judgment of the general term of the supreme court in the eighth district, affirming a judgment rendered in favor of the plaintiff at the circuit, held by Justice DAVIS, in the county of Niagara, in January, 1858.

The action was on a policy of insurance, issued by the defendant through its agent, James W. Reed, to the plaintiff, wherein the defendant agreed to insure the plaintiff against loss by fire of certain buildings owned by him, situate in Lockport, Niagara county, for the term of one year from the 20th day of July, 1854, for the sum of \$400, in consideration of a premium paid by said plaintiff therefor.

It is claimed by the plaintiff that the policy was renewed for the term of one year from the 27th July, 1855, by a certificate of renewal, dated the said last mentioned day, signed by the secretary and president of the defendant, and by said Reed as agent, for which renewal the plaintiff paid said agent the sum of four dollars.

The genuineness of this paper is not denied, but it is claimed by the defendant that at the time said certificate was issued, the said Reed was not agent, such agency having been terminated in the May preceding.

On the trial the plaintiff proved the execution and delivery of the policy, the agency of Reed, by proving his appointment, which was in writing, under the seal of the company, and dated the 18th of November, 1853. The plaintiff also proved several letters written to said Reed by the secretary of the company recognizing him as agent.

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the last of the letters bearing date the 2d of May, 1855. The destruction of the property by fire on the 24th of May, 1856, was also proved, and that proofs of the loss required by the by-laws of the defendant were delivered to the defendant within the time limited.

On the part of the defendant it was proved that said Reed, in May, 1855, returned to the defendant all the blank policies and certificates of renewal, as it was supposed, that had been issued to him, and the defendant never heard of him again in relation to business, nor of the renewal of the plaintiff's policy.

The defendant offered to prove that Reed resigned and relinquished his agency, and the same was accepted by the defendant, in May, 1856. The evidence was objected to by the plaintiff's counsel, and the objection was sustained and the evidence excluded, to which the defendant's counsel excepted.

It was conceded that this action was commenced April 15th, 1857.

It was provided by the fourteenth condition annexed to the plaintiff's policy, that no suit or action, if any, against said company for the recovery of any claim upon, under, or by virtue of said policy, should be sustainable in any court of law or chancery, unless commenced within six months next after any loss or damage should have occurred; and if brought after that time, the lapse of time should be taken and deemed conclusive evidence against the validity of the claim.

The proofs being closed, the defendant's counsel requested the court to direct the jury to render a verdict in favor of the defendant, on the ground that the action had not been commenced within six months after the occurring of the loss. The court declined so to charge, and the defendant excepted.

The defendant's counsel requested the court to charge the jury, that the omission to bring the action within six months should be deemed and taken as conclusive evidence

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against the validity of the plaintiff's claim. The court refused so to charge, and the defendant's counsel excepted. The court thereupon directed the jury to render a verdict for the plaintiff for the amount claimed and interest, to which instruction the defendant's counsel excepted. The jury rendered a verdict in favor of the plaintiff for \$328.

The defendants appealed to the general term of the supreme court, in the eighth district, where the judgment was affirmed, on the ground that the condition limiting the right of action to six months from the loss was against public policy and void.

The defendants appealed to this court. The case was submitted by

Ely & Farwell, for the appellants.

J. L. & J. H. Buck, for the respondent.

MULLIN, J. The only question for our consideration on this appeal is, whether the condition annexed to the policy requiring an action to recover the amount of a loss to be brought within six months from the time the loss occurred, is valid? If it is, the action is undoubtedly barred, and the judgment must be reversed.

At the last March term of the court, we held in the case of *Ripley v. The Aetna Insurance Company*,* that a condition precisely like the one in this case, except that the right to bring the action, was limited to one year, was valid. And that the action not having been brought within the year, was barred, and the judgment which was for the plaintiff in that case was reversed.

That case is decisive of this. The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

All the judges concurring, judgment reversed.

**Ante*, p. 136.

Abstract of case.

GEORGE POLLEN AND ROBERT COLGATE v. THOMAS O.
LE ROY AND DAVID SMITH.*

The plaintiffs agreed to sell and deliver to the defendants a quantity of soft English lead, of the "Walker, Parker & Walker brand," to arrive by the Providence, from Newcastle. The lead arrived at New York on the 6th of July, 1853. On that day the plaintiffs notified the defendants of its arrival, and requested them to receive and remove it. The defendants objected to the lead, and declined to consider it theirs, or at their risk. On the 7th, the plaintiffs again notified the defendants that lead was discharging from the vessel, which they claimed to be such as the contract of sale called for, and offered it to the defendants, who declined to receive or pay for the lead, or to have anything to do with it. *Held*, that this was a sufficient offer of performance and tender of the lead by the plaintiffs; and that they were not required to make or attempt a manual delivery of the whole quantity of lead, or of any part of it.

And the plaintiffs having, upon the refusal of the defendants to receive and pay for the lead, given them notice that they (the plaintiffs), should sell the lead for their account, and hold them responsible for any deficiency on the re-sale, and for the expenses of keeping and re-selling the article; *held*, that assuming that the lead offered, was of a character to satisfy the contract, the plaintiffs were authorized to sell the same, in the ordinary way of selling metals by a broker, for the highest market price, without notice to the defendants of the time and place of sale. And that having so sold the property, they might recover of the defendants the difference between the contract price, and the proceeds of the sale, together with all expenses necessarily incurred.

Held, also, that in an action brought for that purpose, evidence of the re-sale of the property, and of the resulting loss, together with the expenses, was properly admitted; and that in the absence of any other evidence upon that subject, the jury were properly instructed to make that the measure of damages, if they should find for the plaintiff.

The difference between the agreed price of an article, and its market value at the time of delivery, is the actual damage sustained by a vendor upon a refusal by the vendee to accept the property sold, and the vendor may ascertain or liquidate this amount by a re-sale; taking all proper measures to secure as fair and favorable a sale as possible.

Although the law regards the vendor, if in possession of the goods, as the agent *quoad hoc* of the vendee in such a case, yet it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold, or exposed for sale.

The ordinary usage of the trade being to effect sales of pig lead through the negotiation of brokers, a vendor is bound to adopt that method, upon

* Decided September Term, 1863.

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re-selling the goods because of the refusal of the vendee to accept them. Where an ambiguity exists in a bought and sold note, from its describing an article which does not exist, evidence by an expert to show how the article mentioned therein is ordinarily spoken of, in trade and conversation, is competent in explanation of the ambiguity.

Where a sale was concluded by a bought and sold note in writing, containing all the elements of a contract, the names of the parties, price, description of the article, time of delivery and time of payment; *Held*, that it was not competent to vary this by asking a witness "what conversation passed on the subject of this sale, prior to the actual delivery to the respective parties of the sale note." That the question was too broad, and the answer would have introduced matter, both irrelevant to the issue, and improper in itself.

The plaintiffs agreed, through a broker, to sell and deliver to the defendants "150 tons soft English lead of W., P. & W. brand," to arrive by a specified vessel. The defendants, on the arrival of the lead, refused to receive it, on the ground that it was not the brand called for by the bought and sold note. There being some evidence tending to prove that lead of the brand "W., P. & W." had been seen in the New York market; *Held*, that this rendered it proper to submit to the jury the question whether such a brand was in existence, so as to enable the plaintiffs to comply literally with the contract.

And the jury having by their verdict determined that no such article existed in the trade, as the contract between the parties described, and that there was no firm of W., P. & W. in existence; *Held*, that the lead on board the vessel having been manufactured by a firm, two of whose members were named W., and one P., known as "W., P., & Co.," and being the only firm composed of individuals of those names, engaged in the business, and such lead being branded by them, "W., P. & Co., the contract was satisfied by a delivery of that lead.

Where a contract for the sale of lead, required that it should be "soft English lead;" *Held*, that it was not erroneous to leave it to the jury to say whether by "soft English lead," was known in commerce soft lead made in England, no matter from what ores.

Appeal from a judgment of the Superior Court of the city of New York.

THE action was to recover damages for the non-performance of a contract of sale of certain lead, brought by the plaintiffs, as vendors, against the defendants, as vendees. The complaint alleged a sale of "one hundred and fifty tons of best English lead, of Walker, Parker & Walker, brand, to arrive by ship Providence from Newcastle," a notice and a request to the defendants to receive the lead, and their refusal to do so. That upon such refusal the

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plaintiffs gave notice to the defendants that they would require them to perform their contract, and should sell the lead for their account, and hold them responsible for the deficiency, and for expenses, &c. That they did so sell, and the deficiency and expenses were \$4,923.68, for which they ask judgment. The answer denies the contract alleged in the complaint, and alleges that the lead sold there was soft English lead, branded Walker, Parker & Walker; denies that any such lead was on ship Providence, but avers that the lead she brought was hard and refined; denies that they were ever requested to receive such lead as they bought; denies that the lead on this ship, or which was tendered to the defendants, was soft English lead, branded Walker, Parker & Walker, or was such lead as the defendants had agreed to purchase, or was manufactured by Walker, Parker & Walker, or was of their brand. Alleges that the lead which arrived by this ship and was tendered to the defendants was branded Walker, Parker & Co., which was an inferior brand; denies damage by the plaintiff, and counter-claims damage for a breach of the contract by the plaintiff. There is a reply denying the other matter of the answer.

At the trial the plaintiffs proved a sale note, signed by Turrell Brothers, brokers: "Sold T. O. LeRoy & Co., for account of Pollen & Colgate, one hundred and fifty tons soft English lead, of Walker, Parker & Walker brand, to arrive per Providence from Newcastle, at six and five-eighths cents per pound, cash." They gave evidence that no lead branded Walker, Parker & Walker was known in market; that there was lead branded "Walker, Parker & Co.," and "Walker, Parker & Co., Newcastle-upon-Tyne," and "Walker, Parker & Co., London." There was also evidence that these brands or marks indicate different qualities of metal, and on the other hand that they indicated only the place of manufacture of lead of the same quality, made by the same house, having establishments in different places. This lead arrived July 7th, 1853, and the evidence

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was that it was marked "Walker, Parker & Co., Newcastle-upon-Tyne." The plaintiffs proved the re-sale and quality of the lead, under objection and exception by the defendants. They proved the account of the re-sale of the lead, and its delivery to the defendants, the defendants objecting that it was incompetent and irrelevant because there had been no notice of the sale and no tender. Certain testimony of members of the firm of Walker, Parker, Walker & Co., and persons in their employ, taken by commission, was read. One of these witnesses testified that the lead of this shipment was branded Walker, Parker & Co., and not Walker, Parker, Walker & Co., because the pigs were cast shorter than usual, to suit the American market, and were too short to be branded with the full name of the firm, and that there was no difference in quality in lead marked either way. This was objected to and overruled, and the defendants excepted. The same witness testified that his firm was the only house in this trade of the same or a similar name, and no lead known in trade as that of Walker, Parker, Walker & Co., except this. To this the defendants objected and excepted. He testified that the description "soft English lead, Walker, Parker & Walker brand, from Newcastle," would designate, with the same certainty, soft lead cast by Walker, Parker, Walker & Co., with the brand Walker, Parker & Co., as the soft lead cast by them marked Walker, Parker, Walker & Co., and that there is no difference in the market value of these brands. This was objected to and the defendant excepted. Similar objections were taken to similar testimony, and other exceptions.

The plaintiffs rested, and the defendants moved for a non-suit, because the agreement was for lead of a particular kind, which was not on the ship *Providence*. 2d. Both parties were mistaken as to the lead on the ship, if there was no lead of that brand, and there was, therefore, nothing for the contract to operate upon, and the plaintiffs cannot recover by showing the delivery of another article.

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3d. There is no evidence of damage, because the re-sale was made privately and without notice to the defendants. 4th. That the plaintiffs, by taking the lead and selling it, rescinded the contract, and can bring no action founded on it. 5th and 6th. Repeating the allegations of non-performance of the contracts. The non suit was refused and the defendants excepted. The defendants then gave evidence on the points to which the plaintiffs' evidence was addressed, and also to prove that this firm used foreign as well as English ores. One of the defendants was called and testified that he had a conversation with Turrell before the sale note was delivered, and was asked what conversation passed on the subject of this sale, prior to the actual delivery to these parties of the sale note. The question was objected to and excluded, and the defendant excepted. A manufacturer of white lead was called, and among other things was asked "what kind of lead is required to make white lead?" The question was objected to and excluded, and the defendant excepted. The same witness testified to receiving this lead and rejecting it because of the mark not being Walker, Parker, Walker & Co. He was looking to buy for one Stearns. He was asked if Stearns had arranged to purchase this lot of the defendants. This evidence was objected to and excluded, and the defendants excepted. Pollen, one of the plaintiffs, was sworn, and asked how the lead manufactured by the Walker house was known in market; how it was generally spoken of by persons who alluded to it. The question was objected to and the objection was overruled, and the defendant excepted. The witness answered, "we generally speak of it as the Walker lead." A witness testified that he had bought lead marked Walker, Parker & Walker. There was evidence given by the partners of the English house that Pollen & Colgate had not paid for the lead, and that this suit is prosecuted for their benefit. At the close of the testimony the defendants again moved for a non-suit, on the ground that there was evidence of the existence of

the lead called for, and because the plaintiffs had no interest in this action. The motion was denied, and the defendants excepted. The defendants' counsel submitted five propositions, or requests, to charge. The court declined to charge except as in the charge given, and an exception was taken. The court charged, and various exceptions to the charge were taken, which are noticed in the opinion.

The jury rendered a verdict in favor of the plaintiffs for \$7,580.34, and judgment was entered for that sum, with costs. A motion for a new trial was denied, and the general term affirmed the order and judgment (see 10 Bosw. 38, S. C.), whereupon the defendants appealed to this court.

William Curtis Noyes, for the appellants.

George F. Comstock, for the respondents.

EMOTT, J. The lead which was the subject of the sale by the plaintiffs to the defendants, arrived at New York, on the 6th of July, 1853. On that day the plaintiffs notified the defendants of its arrival, and requested them to receive and remove it. On the same day, the defendants objected to the lead, and declined to consider it theirs, or at their risk. On the 7th, the plaintiffs again notified the defendants that lead was discharging from the vessel, which they claimed to be such as the contract of sale called for, and offered it to the defendants. In answer to this, the defendants verbally declined to receive or pay for the lead, or to have anything to do with it. This was a sufficient offer of performance and tender of the lead by the plaintiffs. They were not required to make, or attempt a manual delivery of the whole 150 tons of lead, or of any part of it. It was sold on ship board, to arrive at a future day, and it was enough that the plaintiffs notified the defendants of its arrival, and requested them to take it as it was discharged from the vessel. The defendants' answer, indeed, admits a

tender of lead which arrived on the ship Providence, but denies that this lead answered the description of the contract. The plaintiffs allege in their complaint, that upon the defendants' refusal to receive and pay for the lead, they gave notice to said defendants that they should sell the lead for their account, and hold them responsible for any deficiency on the re-sale, and for the expenses of keeping and re-selling the article. This is not denied by the answer, and the consequent admission is of the whole of the facts in the case, on the subject of notice of the plaintiffs' re-sale of the article. At the trial the plaintiffs proved, under objection and exception by the defendants, the re-sale, the expenses of keeping the lead, and the proceeds of the re-sale. This sale was made on the 13th of July, and was for the highest market price on that day. It was made in the ordinary way of selling metals, by a broker, and seems to have been fair in all respects. There was no other evidence given of the value or market price of the article between July 7th and 13th, or upon the question of damages. The defendants insisted, upon a motion for a non-suit, that there was no competent proof of damages, but the court denied the motion, and subsequently instructed the jury that if they found the plaintiffs entitled to recover, their damages would be measured by the loss shown by the result of the re-sale, with the expenses which were proved. Assuming that the lead offered by the plaintiffs was of a character to satisfy their contract, and that the defendants were therefore in default, the vendors had a right to dispose of the lead as soon as they could, with due regard to the interests of the vendees, and after having given them notice of their intention, and to hold the latter responsible for the difference between the agreed price, and the sum realized, together with all expenses necessarily incurred. It cannot be necessary to adduce either authority or argument to support a rule so constantly recognized in the law of sales as this is; unless upon some theory that nothing is settled in these days, except what is to be found in a recent decision

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of this court. But it is strenuously contended that it is a part of this rule that the result of such a re-sale can neither control the question of damages against a defaulting vendor, nor be given in evidence for such a purpose, unless the vendor gives notice to the vendee of the time and place of the proposed re-sale, as well as of his intention to make it. There is not the slightest foundation, however, either in principle or authority for such an addition to the rule as I have stated it. The rule itself is founded upon good sense and justice, and was probably adopted by usage and consent before it was sanctioned by the courts, as was observed in *Sands v. Taylor* (5 J. R. 395.) A vendor in such a case, may, if he choose, abandon the property, treat it as the vendee's, and sue the latter for the price. But it can hardly be for the interest of the latter that he should do so, and especially not in the case of perishable property, when the result might be a total loss to the vendee. He may, therefore, sell the property as speedily as possible, and recover the deficiency, together with his expenses, as damages. This rule is the same in all sales, and in respect to property of every description. As was said by BEST, CH. J. in *Mac Lean v. Dunn* (4 Bing. 722), if articles are not perishable, price is, and he adds: "It is a practice founded on good sense to make a re-sale of a disputed article, and to hold the original contractor responsible for the difference." The difference between the agreed price of an article, and its market value at the time of delivery, is the actual damages sustained by a vendor upon the refusal by a vendee to accept the property sold, and the vendor may ascertain or liquidate this amount by a re-sale, taking all proper measures to secure as fair and favorable a sale as possible. The law regards him, it has been said in some of the cases, if in possession of the goods, as the agent *quoad hoc* of the vendee. But it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold, or exposed for sale. Indeed, in a majority of cases

such a notice would be entirely impracticable, as it would have been in this. Unless the sale is to be public and at auction, no notice of the time and place can be given. But in very many cases, sales by auction are not the usual, nor are they a favorable mode of disposing of merchandize. There is nothing in the present case to show that sales by auction are customary in trade in metals, and there is every reason to infer that such a sale would have resulted much more injuriously to the defendants than the course pursued by the plaintiffs. The ordinary usage of the trade is to effect sales of pig lead through the negotiation of brokers. This usage the plaintiffs were bound to adopt, to obtain the full and fair value of the article. But it was manifestly impossible to give previous notice of the time and place of sale thus effected. On the other hand, if the lead had been sent to auction, it is not likely that any notice of the time and place would have saved the plaintiffs from complaint of the enhanced loss which so unusual a mode of disposition would have entailed. That complaint would have been more difficult to answer than the present. There is no analogy in this particular between this case and that of a pledge! The pledgee is not the owner, nor the agent of the owner. He is clothed with the possession and with a right to sell the property, in order to repay himself a debt. Unless he resorts to judicial proceedings to extinguish the right of his debtor, he is bound to give notice to the latter such as would be involved in such proceedings, both to redeem his property by payment, and of the steps by which he proposes to extinguish his title, and satisfy the debt in default of payment. A vendor, on the contrary, is simply an agent, if he elect to become such, of a vendee who refuses to complete his purchase; an agent to sell the property fairly, and to the best advantage. The only requisite to such a sale as a measure of the rights and the injury of the party, is good faith, including the proper observance of the usages of the particular trade.

There is nothing in any of the cases which I have found

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requiring more than this, with the exception of one recent decision of the supreme court in this state. The rule was stated and approved by HOLT, in *Langfort v. Tiler* (1 Salk. 113; S. C. 6 Mod. 162), without the qualification contended for by the defendants' counsel; and although in one case at *nisi prius* in the English courts, it was denied by Lord ELLENBOROUGH (3 Campb. 426), it was subsequently fully reinstated. (*Boorman v. Nash*, 9 B. & C. 145; *MacLean v. Dunn*, 4 Bing. 722.) In none of these cases was any notice of the time and place of sale given or required. In our own country, in the leading case of *Sands v. Taylor* (5 J. R. 395) already cited, the re-sale was made by auction, and notice given to the vendee of the time and place of the sale. But there is nothing in the opinions delivered by the judges in that case requiring or insisting upon such a course. The article was wheat. No question was made as to the mode of re-sale, and it seems to have been taken for granted that a sale at auction was a customary mode of disposing of such a commodity. In *Bement v. Smith* (15 Wend. 493), the rule was extracted from the cases, especially that of *Sands v. Taylor*.) No such qualification or addition was stated, and none such can have been supposed to exist. The superior court of New York, in *Crooks v. Moore*, upheld a re-sale by a vendor upon a vendee's default, through a broker and without notice of time or place, except that the goods would be put in market the next day. The only case to the contrary to which we have been referred is *McEachron v. Randles* (34 Barb. 301). The judgment of the supreme court in that case can be upheld on other grounds, but the opinion of the learned judge upon that point can not, I think, be maintained upon principle or by the authorities. The evidence of the re-sale and the resulting loss, together with the expenses, was properly admitted in the present case, and as there was no other evidence of damages, the jury were properly instructed to make this the measure, if they found for the plaintiff.

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The defendants objected to the admission of evidence offered by the plaintiffs to show the reason why the same lead manufactured by the firm of Walker, Parker, Walker & Co. was sometimes marked with the full name of the firm, and sometimes "Walkers, Parker & Co.," and that there was no difference in lead with these two different marks. If there had been shown to have been any lead in market of the precise description, or with the brand described in the contract between these parties, this evidence would probably have been immaterial. But the jury have found that there was no such mark or brand of the article known, and at the stage of the case when this evidence was received, there was no evidence tending to show the existence of any such brand of lead. There was no firm with these names in the trade besides the firm of Walker, Parker, Walker & Co., in England, from whose members and employees this evidence was obtained. Under these circumstances the facts to which I have referred were properly received to explain the meaning of the parties, and upon the main issue to which I shall presently refer. Similar considerations will dispose of the objection to the evidence to show how the lead made by this house was ordinarily spoken of in trade and in conversation. This was competent in explanation of the ambiguity which had arisen in respect to the contract, assuming the bought and sold note to describe an article which did not exist.

The defendants' counsel asked one of the defendants who was a witness, and who negotiated the purchase from the broker, "What conversation passed on the subject of this sale, prior to the actual delivery to these respective parties of the sale note?" This was objected to and excluded. The sale was concluded by a bought and sold note in writing, containing all the elements of a contract: the names of parties, price, description of the article, time of delivery and time of payment. It certainly was not competent to vary this by evidence of what passed in the previous negotiations. Evidence of fraud, or of a warranty,

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was not admissible under the pleadings in this case. The only issue is the contract and its performance as to the specific article sold and tendered. It may be that evidence of conversation between the parties as to the article intended might be competent in the state of facts which was developed in that particular, although it is not necessary to concede as much as this. But the difficulty with the question which was excluded in this instance is that it was too broad. The witness was not asked if anything was said in reference to the brand or description of lead, or what was said upon that subject; but he was asked what conversation passed on the subject of the sale, before it was concluded. This was too general an inquiry, and does not present the point discussed on the present argument. The answer would have introduced matter both irrelevant to the issue and improper in itself.

There was no error in rejecting evidence to show that the lead tendered to the defendants was not fit for the manufacture of white lead. No issue was offered or made by the answer or otherwise, upon any warranty or representation to that effect. There is an allegation in the answer that the lead was unfit to make white lead, but neither in the pleadings nor in the proof is there anything to show that it was represented to be suitable for that purpose; and the denial, in the reply, of the averment, in the answer, that it was not fit for such manufacture, did not require the court to receive evidence upon an immaterial issue.

The defendants took a variety of exceptions to the charge of the judge. The principal question in the case, whether there was any such article as lead of Walker, Parker & Walker's brand, was left to the jury, with instructions that if there was any article of that name ever sold in New York market known among dealers as an article of merchandize, the plaintiffs were bound to deliver that identical article. That such an article must be known among dealers as an article of merchandize, however, and it would not

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be sufficient to this end if an importer had transferred such lead to a manufacturer, and no other dealers in lead had ever heard of it. The jury were told again that the first question for them was whether the plaintiffs could have furnished an article of this kind so as to have complied with the precise terms of the contract; and again to inquire whether there was an article known in the trade as Walker, Parker & Walker's brand. This was the substance of the instructions to the jury upon the first question submitted to them as to the performance of the contract, and most of these directions were excepted to. That the question whether there was, in fact, such an article as the lead mentioned in the contract, was a question for the jury, admits of no doubt in the present condition of the cause. When the cause was here before, the court assumed as a fact what indeed there was no evidence to controvert, to wit: that there was no such brand or description of lead as that specified in the contract. Upon that assumption this court held that the question what the parties intended to sell and to buy should have been submitted to the jury. There was some evidence on the present trial tending to prove that lead with such a mark had been seen in the New York market, and this rendered it proper to submit to the jury the question whether such a brand was in existence, so as to enable the plaintiffs to comply literally with the contract. I see no error in the manner in which this question was submitted. The parties entered into the contract as merchants, and made use of the language "one hundred and fifty tons soft English lead, Walker, Parker & Walker brand," as terms of trade and art, to describe the commodity bought and sold. It is not language intelligible to ordinary persons who are not dealers in the article, and we are to assume that they used it with reference to the trade and the market. The question was not whether pigs of lead had ever been seen by anybody with such a mark upon them, but whether the parties knew, or should be presumed to have known, such

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a brand as dealers, and whether the plaintiffs could have procured and delivered it. It was an article of trade to which they referred, and the jury were correctly directed to determine whether there was such an article of trade as lead of the brand "Walker, Parker & Walker."

Nor was there any error in the remarks of the judge upon the testimony of the witness Jewett, who swore that he had seen and bought several thousand pigs so branded. If a number of witnesses have the opportunity and the interest to notice a particular fact if it occurs, and have their attention directed to it, and they do not have any knowledge of its occurrence, their testimony is more than mere negative testimony, and is entitled to more weight against a positive statement by another witness.

The jury by their verdict determined, as this court formerly assumed, that no such article existed in the trade, as the contract between these parties described. The court on the former appeal, as I have said, held that in that event, we were bound to ascertain whether the parties did not mean something by the language which they used, and what they meant. This was the next question left to the jury, and in a manner free from any just exception. The proposition, that if there was no such brand or mark known in the market, the parties were to be deemed to mean lead of a particular character, to be ascertained by comparison of the phrases in use in the market, was unexceptionable. It was in effect repeating what was held by this court. The judge recapitulated the facts as to the article of lead known as Walker, Parker & Co.'s brand in the market, and made by the only firm composed of individuals of these names, and he left it to the jury to say, whether lead made by their firm, and branded with their name, would or would not be known as such an article as the contract called for, there being nothing known in market exactly answering its description and calls. I perceive nothing in this but an application to the particular facts disclosed on the trial of the rule given by this court for this part of the case. The

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jury might properly say upon this evidence that these parties meant by their contract, lead of Walker, Parker & Walker manufacture. If there was no such brand or trade mark known as that specified in their contract, it was not an unreasonable interpretation of their language, to hold that they intended soft English lead, manufactured by the house of Walker, Parker & Walker, who were well known in the trade. It is indeed, very difficult to resist the conclusion that the article offered by the plaintiffs to the defendants, was the very article intended and specified by the contract, and that the language employed in the bought and sold note, and which described no known brand or style of manufacture, was simply a mistake or an incorrect description of what was intended.

The contract required that the lead should be soft English lead. The defendants contended that nothing would answer this description but lead made wholly of English ores. The judge did not reject this definition, but left it to the jury to say whether by soft English lead was known in commerce soft lead made in England, no matter from what ores. This certainly was all that the defendants could ask on this point.

With regard to the amount of this verdict, that was fixed by a calculation accepted by the court, and given to the jury in the charge without exception. The various principles by which the verdict was to be determined were excepted to, but the amount of the result, if the verdict was for the plaintiff, was not questioned at the trial. There was no motion to set aside the verdict for excessiveness, and the question of correctness in respect to the kind of ton computed, or the computation made, is not before us. There is no objection to allowing the defendants to apply to the court below to correct any error in this respect if they see reason to do so. The judgment is not open to any other objection, and should be affirmed, with costs, but with leave to apply to the supreme court to correct the verdict.

All the judges concurring, judgment affirmed.

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**HENRY MICHAELS and ISRAEL SLOMAN v. THE NEW YORK
CENTRAL RAILROAD COMPANY.**

A common carrier, to exempt himself from liability for injuries happening to goods while he is engaged in transporting them for hire, must show that he was free from fault at the time the injury or damage occurred, and that no act or neglect of his concurred in or contributed to the injury. If he has departed from the line of duty, and has violated his contract, and, while thus in fault, and in consequence of that fault, the goods are injured, by an act of God, which would not otherwise have produced the injury, then the carrier is not protected.

When goods are delivered to a railroad company, by a connecting railroad company, to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to send them off, immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods.

The defendant, a common carrier, received, at Albany, from the Hudson River Railroad Company, a box of goods to be transported to Rochester and delivered to the owners, for hire. Instead of forwarding the box immediately, it detained the same in its freight house at Albany, to await the rendering of a bill for back charges, by the Hudson River Railroad Company. While so detained, the goods were injured by being wet by an unusual and extraordinary rise in the waters of the Hudson river. *Held* that the detention of the goods was negligence on the part of the defendant; and that such negligence having concurred in and contributed to the injury to the goods, the defendant was precluded from claiming the exemption from liability which the law would otherwise extend to it.

Held, also, in an action brought by the owners of the goods, against the carrier, to recover for the damage done to the goods, that the judge, on the trial, properly refused to direct a verdict for the defendant on the ground that the injury complained of was caused by the act of God, and without any fault or negligence on the part of the defendant; or because the goods were in the possession of the defendant, at the time, in the character of a warehouse-man, and not as a common carrier.

Held, further, that the judge properly instructed the jury that, under the evidence, the defendant was liable as a common carrier for the damages sustained by the plaintiffs; and that the only question to be considered was the amount of damages.

Appeal from a judgment of the Supreme Court.

THE action was against the defendants as common carriers, and the complaint alleged that about the 1st of Feb-

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ruary, 1857, there was delivered to them, at the city of Albany, a case of goods containing valuable cloths and velvets, belonging to the plaintiffs, for transportation to the city of Rochester; that the defendants carelessly and negligently allowed said goods, while in their possession as common carriers, to be wet and damaged; that the defendants delivered the goods in the city of Rochester on the 17th of February, 1857, but that the same were injured and damaged by reason of being wet, and that such damage to the plaintiffs amounts to \$110.35. The defendants answered generally denying the allegations of the complaint, and alleging as an affirmative defense that the alleged injury to the goods was occasioned by the act of God, and not by or through any negligence or carelessness of the defendants, nor had the defendants the ability or power to avoid the same; and they are not liable in damages for such injury.

The action was tried at the Monroe circuit, in January, 1859, before Mr. Justice STRONG and a jury. These facts appeared on the trial: The defendants were, in 1857, common carriers. On the 5th of February of that year there was delivered to the defendants, by the Hudson River Railroad Company, at Albany, three cases of dry goods, the property of the plaintiffs, for transportation for him, from the city of Albany to the city of Rochester. The cases of goods had been purchased by the plaintiffs from the same house in the city of New York, at the same time. Two of the three cases were received in Rochester by the defendants railroad, between the 1st and 7th of February, but the third case did not reach Rochester until the 17th of February, and then the goods were in a damaged condition, which was caused by their being wet, on the 8th and 9th of February, while in the defendants' possession. The damage sustained by the plaintiffs amounted to \$100.

It appeared that the case or cases of goods, on being received from the Hudson River Railroad Company, were

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deposited in a freight house of the defendants in Albany, designated as "B," between Water and Quackenbush streets, and thirteen or fourteen feet above the ordinary tides in the river. One of the cases of goods was in this freight house on the 8th February (Sunday), and on that night and the day following there was an extraordinary and unusual rise of the waters of the Hudson river, and an extraordinary and unusual flood, by which the waters became several feet deep in the streets in the business part of the city of Albany, and contiguous to the defendants' freight house. This flood was occasioned by the blocking up of the river channel by ice, and thus throwing the water back. There had been no premonitions of this flood at Albany on Saturday (7th February), except that the weather had been a little soft. The freight house, except as against such a flood, was a safe and secure place to keep and protect goods, and at no period within thirty years had there been so great a flood, or any rise or flood that would have damaged the case of goods in the freight house in which it was deposited. On Sunday night, about twelve o'clock, the watchman at the freight house notified the defendants' freight agent that the water was rising very rapidly towards the freight house. He collected men and went to them, but did not go into building "B," as the water had surrounded it. About one o'clock the water commenced falling, and fell three feet in half an hour. At this time the water in building "B" had been only a little over the floor. In fifteen or twenty minutes more the water began to rise again, and rose rapidly. It continued rising until seven or eight o'clock in the morning, at which latter time it was about four feet in height in building "B." The defendants had some twelve men about their eight freight houses trying to secure the goods. When the freight agent went into "B" a day or two after the water subsided, he saw the case of goods in question lying on a piece of boiler iron, placed across two barrels that were standing on end. The goods were damaged by this rise of water. The case was in the

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freight house two or three days before the flood. The defendants were allowed to prove by their freight agent, under objection, and as a reason for not sending on the third case of goods sooner, that there was no bill of back charges accompanying it; that one of the defendants' regulations was, and always had been, not to ship property received by it from connecting roads until a bill of back charges upon such property is received, and to ship the property by such bills; that this custom and regulation was known to the Hudson River Railroad Company; that they receive the goods to be forwarded, but not to be forwarded until the expense bill or bills of back charges are furnished. This witness was not able to state whether there were any back charges, or whether the case of goods was sent on to Rochester in its damaged condition before back charges were ascertained, or that any measures were taken to ascertain them. He testified generally that no bill of back charges accompanied the case when it was received by the defendants for transportation; but that all he knew of the matter was, that he could find no entry on the defendants' books in regard to it, and no bill had been sent to him from the defendants' office, which was uniformly done.

The defendants offered to show by the freight agent, that it was the custom among forwarders at Albany to receive goods sent to them by other forwarders to be forwarded unaccompanied by expense bills, and hold them in store until such bill was furnished. The court sustained an objection to this offer and excluded the evidence, and the defendants excepted. At the close of the case, the defendants' counsel requested the judge to direct a verdict for the defendants on the grounds:

1. That it appeared by the evidence that the injury complained of was caused by the act of God, and without any fault or negligence on the part of the defendants, and that the defendants could not for that reason be made liable.

2. That as appeared by the evidence the said box, at the time the alleged injury was sustained, was in the possession

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of the defendant in the character of a warehouseman, and not of a common carrier of goods, and for that reason the defendant could not be held liable as such common carrier.

But the court refused so to direct the jury, to which refusal the defendants excepted, and instructed them that, under the evidence, the defendants were liable as common carriers for the damages sustained by the plaintiffs, and that the only question for the jury to consider was the amount of damages. To this there was an exception.

The jury rendered a verdict for the plaintiffs for \$100. On appeal to the supreme court, the judgment was affirmed. The defendants then appealed to this court.

S. T. Fairchild, for the appellant.

C. K. Smith, for the respondent.

WRIGHT, J. The duty and liability of a carrier begins when the goods are received into his custody for transportation, and ends when they are securely and safely carried and delivered to the owner. He is responsible for every injury sustained by them, occasioned by any means whatever, except only the act of God or the public enemies. On the 5th February, 1857, the defendants as carriers, and not as warehousemen, received at Albany, to be transported to Rochester, a box containing cloths and velvets, belonging to the plaintiffs, and twelve days afterwards delivered the property at Rochester in a wet and damaged condition. For this injury they were liable, unless it was occasioned by one or the other of the causes which legally excuse them. A ground of defense was, that the injury was by the act of God, and not by or through any negligence on their part. If the damages resulted from "the act of God," spoken of in the law of carriers, and the defendants were without fault, the court below was wrong in adjudging them liable. This is the principal, if not the only question in the case.

There was no conflicting evidence, and neither party

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asked to go to the jury on any disputed fact. We are to see then what the case was as the evidence presented it. The box containing the goods damaged, was one of three purchased together in the city of New York, about the 1st February, by the plaintiffs, who were merchants at Rochester. Two of the boxes came to the plaintiffs' hands over the defendants' railroad, not later than the 7th February. The defendants admit that the three boxes were delivered to them at Albany on the 5th of February, to be transported to the city of Rochester; and the inference is almost irresistible that two of them were at once forwarded, and the third, by the negligence of the defendants' employes, left behind. The excuse offered for not forwarding the injured parcel was, that no bill of charges for transportation by the Hudson River Railroad Company accompanied it, and that it was one of the defendants' regulations, known to the latter company, to receive from it goods to be forwarded, but not to forward them, until bills of back charges were furnished. It was not shown that there were any back charges, and some days after the goods had been damaged, the defendants forwarded them without any expense bill. The defendants had at Albany eight buildings for the reception of freight to be carried, in one of which the damaged box was deposited. These buildings were situated near the docks upon Hudson river, and not, as subsequently appeared, out of the reach of a rise of water by damming the river with ice below the city in time of a freshet. On the 8th February, and after the goods had been in possession of the carrier three days at least, one of these freshets, not uncommon in the upper sources and tributaries of the Hudson, and at Albany, occurred, breaking up the ice in the river, creating an ice obstruction at the *overslaugh*, and setting the increased volume of water back upon the lower streets of the city. There had been slight indications of this freshet at Albany the day before, but whether there had been on Sunday (on the night of which the flood reached its height), the case does not disclose. It is reasonable to

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presume that this must have been the case, as the water was rapidly rising at ten o'clock that night, and at twelve o'clock had reached the defendants' freight houses, which were some thirteen feet above the ordinary tides in the river, and before it subsided, which was eight hours afterwards, had risen four feet in one of the buildings. This rise of water was an unusual and extraordinary one, the like of which had occurred at no period for thirty years previously. Except as against such a rise, the freight house of the defendants was a safe and secure place to keep and protect goods, and at no time for thirty years had there been any rise or flood that would have damaged the plaintiffs' goods in the freight buildings in which they were deposited. The goods were wet by this rise of the water, and damaged. It seems that the defendants took no steps to protect the property against the probable effects of the rise after it had commenced, until about twelve o'clock on Sunday night, when their freight agent was first apprised by another employee, that the river was rising rapidly towards the freight house; but it appears quite clear, that if at this time, anything had been done in that direction, the plaintiffs' goods would have escaped injury from the water. The freight agent did not go or send any person into building "B" where the goods were on first visiting the freight house, and the reason assigned was, that the building was surrounded by water. About one o'clock in the morning, the water began falling, and fell three feet in half an hour. It had then risen but a little over the floor in building "B." Had the men at that time sent to the building, raised the plaintiffs' box of goods from the floor, no injury would have occurred. Nothing, however, of the kind was done. The direction was to place the cars along by the floors of the freight house, and load in the goods, but this was impracticable because the tracks were blocked up with ice. Shortly thereafter the water commenced rising again, and continued to rise until seven or eight o'clock in the morning, at which latter time it was about four feet in

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height in building "B." During this period, and while they were able to work there, some of the defendants' employees were engaged in raising the freight from the floor of the building. They laid the plaintiffs' box of goods on a piece of boiler iron, placed across two barrels standing on end; which, if the same thing had been done before the second rise of water, would doubtless have avoided the injury.

This was, in substance, the case disclosed, and the question recurs whether the judge erred in holding the defendants liable. In other words, whether the defendants, as carriers, brought themselves within one of the two exceptions to their legal liability. What is precisely meant by the expression, "act of God," as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it can not be considered the act of God; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the "act of God," or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God. (*McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earl*, 31 Barb. 38; affirmed in this court; *Smith v. Shepherd*, cited in *Abbott on Shipping*; *The Trent Navigation Company v. Wood*, 3 Esp. R. 127; *Forward v. Pittard*, 1 Term R. 27; *Campbell v. Moore*, 1 Harp. Law Rep. 468; *McHenry v. Railroad Company*, 4 Harrington R. 448; *Sierdett v. Hale*, 4 Bing. R. 607; *New Brunswick St. Boat Company v. Tiers*, 4 Zabriskie, 697; *Edwards on Bailments*, 454; *Angell on Carriers*, § 156.)

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The goods were damaged in this case, in consequence of a freshet in the Hudson river, on the 8th and 9th of February. The ice was broken up and lodged in the channel of the river, creating an obstruction to the flow of the water, and setting it back upon the lower part of the city, so that the rise was, in part, at least, the result of the obstruction. The combined influences of the freshet and obstruction produced the rise of water which wet the plaintiffs' goods. They were natural causes, of which the injury was not the direct but the remote consequence. Passing by, however, the question of remoteness of cause and effect, and attributing the damage directly to the rising of the water in the river, was such damage the act of God, in the legal sense of the term? On this point I can not entertain a doubt. There was too much of negligence on the part of the defendants, and too much of human agency creating or entering into the cause of the disaster, to bring the case within the exception to the carrier's absolute liability, for the safety of property which he undertakes to carry. It was shown that there was a flood—no unusual event at Albany—which, in the nature of things, could not have been sudden and unforeseen, and the goods in question being exposed to its effects, were injured. It is said to have been an extraordinary flood, the like of which had not occurred at Albany for thirty years previously. But suppose this were so, if the injury which the flood occasioned could have been avoided or prevented, or if the act or negligence of the defendants contributed to bring the property under the operation of the flood, or entered into the cause of the disaster, the injury can not be considered the act of God. This can not be done, in any case, though the injury proceed directly from natural causes, where it might have been avoided by human prudence and foresight, or where human agency creates or enters into the cause of mischief. This extraordinary flood neither could or would have injured the goods of the plaintiffs, had not the defendants, by their prior act or negligence, placed

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them in a situation to be affected by it. And so, also, the flood might have been foreseen, its effects averted, and the goods secured and saved by the exercise of even ordinary care, skill and foresight by the company, or its servants. Had the company received the goods and deposited them outside instead of inside of their freight house, and they had been injured by rain, this, in a certain sense, would have been an injury by an act of God, but no one would pretend that the company was not liable. A carrier is always liable for injuries resulting from his own negligence. Can it make any difference that the goods were in a freight house, that the experience of this freshet showed was located in a dangerous place, and the property in it in danger of destruction in times of high water? I think not. If the defendants misjudged in locating and erecting the building for the deposit of freight to be carried, and they placed it within the reach of any possible effects of freshets, the fault was their own. It was not ordinary but extraordinary prudence which they were bound to exercise in guarding against the effects of any freshet that might possibly occur. Had the defendants left the goods in the open air, fully believing that it would not rain, and they had been injured by a storm, no one would doubt their liability; but I think such liability not more apparent than when they exposed them to the effects of a freshet in a freight house within its reach, which they believed to be a safe place. Suppose, however, the defendants were not guilty of negligence in placing their freight house so near the river as not to have been out of the reach of this particular flood, still it was an act of theirs, and without which, and the further act of putting the goods in it, no injury would have resulted. Had it not been for human intervention, no injury would have occurred by the rise of water. It is not enough that the "act of God," which shall excuse the carrier, is a means, although not the direct and exclusive means, by which loss or injury is produced. In *Smith v. Shephard*, (cited in Abbott on Ship-

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ping,) where there was no actual negligence on the side of the defendant, the loss happened in this way: Just before the defendant's vessel reached the harbor of Hull, a bank there, formerly shelving, had been rendered precipitous by a great flood, where a vessel sunk by getting on the bank, having a floating mast tied to her. The defendant's vessel striking the mast, was forced towards the bank, where, owing to a change in the bank occasioned by the flood, the loss happened. The natural cause, the act of God in changing the bank, was laid out of the question, as not being the immediate cause, and therefore furnishing no excuse. The fastening of the mast, if not the sinking of the ship to which it was attached, were the only remaining causes, and one, if not both, were obstructions placed there by human agency. In *McArthur v. Sears* (21 Wend. 190), human agency intervened to produce the loss, and the carrier was held responsible. Judge COWEN, in an able opinion, considers the meaning of the phrase "act of God," as applied to a carrier's liability, and reaches the conclusion that it is restricted to the act of nature, and implies the entire exclusion of all human agency, whether of the carrier or of third persons. "No matter," he says, "what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome be inevitable, yet if it be the result of human means the carrier is responsible." In *Campbell v. Morse* (1 Harp. S. Law Rep. 468), where the wagon of the defendant, who was a common carrier, in which he was carrying goods for hire, stuck fast in fording a creek, and the water rising suddenly damaged the goods, it was adjudged that the defendant was liable for the damage so occasioned; for though the rising of the water was caused by the act of God, the placing of the goods in that situation was the act of man.

Again: The carrier is always liable for an injury resulting from his own negligence; and when that intervenes, he cannot discharge himself by showing that it was occasioned

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by one of those occurrences which are termed the act of God. If, by his negligence, property committed to him is brought under the operation of natural causes that work its destruction, or is exposed to such cause of loss, he is responsible. So, also, if, but for his neglect, the injury would have been avoided. In the present case it plainly appears that, but for the misconduct and negligence of the defendants, no injury would have happened to the plaintiffs' goods. They detained the goods at Albany, without any reasonable excuse, until the flood came upon the lower part of the city, and then exposed them to its effects. It is not to be presumed that so extraordinary a flood as inundated the wharves and lower streets of the city on the 8th and 9th February could have not been foreseen, and its effects upon the plaintiffs' property avoided. It must, of necessity, have taken some time for the freshet to have accumulated force enough to break up the ice, pile it up on the over-slaugh, and inundate the city. That the flood came suddenly and without warning, or that there were no previous indications of the freshet, is not to be supposed. Yet no steps were taken to avoid its injurious effects upon goods deposited in the defendants' freight houses, until the water had reached the streets surrounding the houses. But even then it was not too late to have prevented the injury. The water had not reached the goods of the plaintiffs, and if then they had been attended to, would have been saved from being damaged. The defendants' employees made no effort in that direction. Their freight agent, after waiting until the water surrounded the building in which the goods were, before visiting the scene of the disaster, assigns that as a reason for not going himself or sending men to raise or remove the goods in that building. He remained about an hour in another building doing nothing, when the water commenced falling, and fell three feet in half an hour. Laborers were then sent to the building where the plaintiffs' box was deposited. The goods had not been damaged at this time, and had the box been raised from the

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floor, as it afterwards appears to have been, the goods would have escaped injury. But nothing was done to secure them. About twenty minutes after one o'clock the water commenced rising again, and continued to rise until seven or eight o'clock in the morning. This rise must have been comparatively slow, for it took seven hours to raise the water less than a foot in depth on the floor of the building where the damaged goods were. During all this time, and while the water was rising, no effort was made to secure the goods against injury; at least not until it had occurred. Men did get into the building about the time the water commenced rising the second time, and the rising water should have warned them to do what was subsequently done after the goods had received the injury, namely, place the box upon the barrels two and a half feet above the floor. So that there was opportunity enough, if it had been improved, even after the defendants' employees reached the freight houses, to have secured and protected the property in question from injury. The defendants, by their own act or neglect, detained or brought the goods under the operation of the freshet, or natural cause; they negligently failed to foresee the freshet in time to have taken them beyond its reach; and after the freshet had appeared, though there was then sufficient time to secure them against injury, neglected to do so. Under these circumstances, it cannot be reasonably pretended that the defendants, as carriers, were excused from liability. To have excused them, the damage must have been exclusively the result of an act of God, and entirely free from the co-operation of man, which was not the case. By the acts or negligent conduct of the defendants, or the admixture of human means, the goods were brought under the operation of an act of God, which worked the injury; and even the injury might have been avoided by ordinary care, prudence, and foresight. A carrier cannot fold his arms when property is entrusted to him, and because it is subjected to natural causes that may work its destruction, make no effort

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to save or protect it from such causes or agencies, and then claim to be exempted from liability. An injury occurring under the circumstances which this case discloses, is, in no legal sense, an injury caused by "the act of God."

Another ground on which the judge was requested to direct a verdict for the defendants was, that the box of goods, at the time the injury was sustained, was in their possession in the character of warehouse-men, and not as common carriers of goods. There is nothing in this point. The defendants, in their stipulation, admitted that they were common carriers, and, as such, the box in question, with two others, was delivered to them at Albany, on the 5th February, to be transported for hire from that place to the city of Rochester. There was not the shadow of proof in the case tending to show that the goods were in their custody as warehouse-men when the injury occurred. It was attempted on the trial to excuse their negligence in transporting the goods to their place of destination, by showing that no bill of charges of the Hudson River Railroad Company had been furnished, agreeably to a regulation of the defendants; but it was not claimed or pretended that the goods had been delivered to them, or were in their custody, otherwise than as carriers.

On the trial, the defendants were not allowed to show by their freight agent that it was the custom among forwarders at Albany to receive goods sent them by other forwarders, to be forwarded, unaccompanied by expense bills, and hold them in store until such bills were furnished. This was not error. Any such custom was entirely immaterial; and could not affect the rights of the parties. The defendants received the goods into their possession as carriers, on the 5th February, and their liability as such forthwith attached, without regard to any custom prevailing among warehouse-men or forwarders at Albany.

The judgment should be affirmed.

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DAVIES, J. The defendants, as common carriers, received, at Albany, on the 5th of February, 1857, three boxes of dry goods, in good order, to be transported from Albany to Rochester, for a consideration which was to be paid on delivery. Two of said boxes were forwarded immediately, on their arrival at Albany by the Hudson River Railroad; and the other, not being accompanied by a bill of back charges from the Hudson River Railroad, was detained by the appellants at their warehouse in Albany. While so detained, the contents of said box were injured by being wet by a rise in the Hudson river, on the 7th, 8th and 9th days of February, 1857. This box was afterwards shipped to, and on or about the 17th day of February, 1857, received by the respondents, unaccompanied by a bill of back charges from the Hudson River Railroad Company. Said goods, while so detained at Albany, were damaged by the said flood, to the extent of \$100. The jury, under the direction of the court, found a verdict for the plaintiffs, and judgment thereon was affirmed at the general term.

Two questions are presented for consideration in this case.

1. Whether the defendants are excusable for the detention of the box at Albany; if not, then was it negligence in them so to do?

2. The injury having happened to the goods by an act of God, are the defendants responsible for that injury, under the circumstances presented in this case?

The law is well settled that common carriers, while engaged in the transportation of goods for hire, are not responsible for injuries to them, caused by an act of God, or the public enemy. With the exception of injuries thus caused, they are liable for all damage to goods entrusted to them, while under their care and control. For the reasons stated in the opinion in the case of *Read v. Spaulding*, decided at this term, the carrier, to exempt himself, must show that he was free from fault at the time the injury or damage happened. He must show that he was without

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fault himself, and that no act or neglect of his concurred in or contributed to the injury. If he has departed from the line of duty, and has violated his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier is not protected. In the present case, it is apparent that if the goods had not been detained at Albany until the happening of the flood, no injury to them would have occurred. The question then recurs, was such detention justifiable, or was it negligence on the part of the defendants? They seek to justify it, on the ground that by their regulations, goods received from a connecting road, were not forwarded until the receipt of a bill of back charges. When the goods in the present case were delivered to the defendants by the Hudson River Railroad Company, who in this respect, acted as the agents of the plaintiffs, to be transported to Rochester, and the same was received by them for that purpose, it became the duty of the defendants immediately to send them off. If the Hudson River Railroad Company delivered no bill of back charges with the goods, nor gave any notice that any such existed, the defendants should have assumed that there were none, and they would have been justified in delivering the goods to the plaintiffs, without any claim for such charges. Clearly the Hudson River Railroad Company could have had no claim upon the defendants for any bill for back charges. They discharged their lien upon the goods for such back charges, by the delivery of the same to the defendants, to be carried and delivered to the plaintiffs without any notice of claim for any such charges; and if any existed, they would have been remitted therefor to their claim against the plaintiffs personally.

I am unable to see any justification to the defendants, for detaining the plaintiffs' goods because the Hudson River Railroad Company did not present a bill for back charges. Its omission to do so, or to give notice that such charges existed, should have been taken as evidence, by the defend-

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ants, that in fact there were no back charges. The ground assumed, that they were justified in detaining the goods until a bill of back charges was presented, cannot be maintained. The regulation of the defendants may be reasonable enough as between the two companies, but it cannot be permitted to affect the rights of third parties, ignorant of its existence, and who cannot be presumed to have contracted with reference to it. If the defendants were not excusable for the detention of the box of goods in Albany, to await the rendering of a bill for back charges by the Hudson River Railroad Company, then such detention was negligence on their part. Such negligence having concurred in and contributed to the injury to the plaintiffs' goods, they are precluded from claiming the exemption from liability which the law would otherwise extend to them. The court, on the trial, properly, therefore, refused to give the instructions asked for by the defendants' counsel, and the instructions and charge to the jury were such as, under the facts proven, it was the duty of the court to give. The judgment appealed from should be affirmed, with costs.

DENIO, Ch. J., was for affirmance on the ground stated by DAVIES, J., and lastly stated by WRIGHT, J.; but did not know that he could concur with WRIGHT, J., as to what is "an act of God." All the other judges concurred with the chief judge, except SELDEN and INGRAHAM, JJ., who did not sit in the case.

Judgment affirmed.

Abstract of case.

LORETTA SMITH v. JOHN T. KNAPP.

A defendant may be legally arrested on a *ca. sa.* issued after judgment in a cause in which an order of arrest has been obtained and an arrest made before judgment, and which order has not been vacated before the arrest on the *ca. sa.*

But where the order of arrest was obtained upon one only of five causes of action stated in the complaint, the first, and the judgment was not finally recovered on that, but upon the fifth cause of action, for which the defendant was not liable to arrest, under the provisions of the code of procedure; and the defendant having been arrested on a *ca. sa.* issued after judgment, and imprisoned thereon; *Held* that his remedy was to move to be discharged from imprisonment, and that, not having done so, his imprisonment was regular.

A delay of more than three months in issuing a *ca. sa.*, where the defendant, at the time of rendering a judgment against him, is in custody upon process issued in the cause, will entitle him to a supersedeas.

The defendant's remedy, in such a case, is to apply to a judge for a supersedeas on the ground that he was not charged in execution within the time limited by statute, or by motion to the court. If he does neither, the imprisonment will be regular, and the sheriff liable on the escape of the prisoner, either as bail or in action for the escape.

The plaintiff has an election which of these remedies he will adopt, and that election is manifested by the complaint.

If he proceeds against the sheriff as bail, he must set forth the proceedings to and including the escape, and allege that the defendant is bail, and the complaint must demand the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendant as bail should be omitted, as wholly irrelevant to the cause of action for the escape.

If the complaint makes no mention of the defendant as bail, and there is nothing in it manifesting an intention or election to hold him liable in that character, it is to be treated as an action for an escape, and the limitation of one year for bringing an action prescribed by § 94 of the code of procedure, applies.

If, in an action for an escape, it is shown that the debtor was totally insolvent, the plaintiff is not entitled to recover of the sheriff the whole amount of the judgment.

It is competent for a defendant, after the entry of judgment, to move to set aside the order of arrest, upon showing to the court that the judgment was reversed on a cause of action for which he was not liable to arrest, and hence that he cannot be legally imprisoned on a *ca. sa.* issued on such judgment. But if he suffers the order of arrest to remain in force, it must be held to be regular, for the purposes of an action for an escape from imprisonment on the *ca. sa.*

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THIS action was brought by the plaintiff against the defendant as late sheriff of Cayuga county, for the escape of one James R. Reynolds, who had been arrested by said defendant by virtue of an order of arrest, duly issued, in a suit brought by the plaintiff against said Reynolds. The facts are substantially as follows, viz: In February, 1854, the plaintiff commenced an action against the above named James R. Reynolds, in the complaint in which were set forth five separate causes of action. The first was for money fraudulently applied to the use of said Reynolds, while acting as the plaintiff's agent. The second was for money lent and advanced. The third for money had and received. The fourth for money paid, laid out and expended, and the fifth on a promissory note made by the said Reynolds to the plaintiff, for the sum of \$670.

The plaintiff upon affidavit, procured an order for the arrest of said Reynolds, and he was arrested by the defendant, then being sheriff of Cayuga, on the 25th February, 1854, and the said Reynolds was for want of bail confined in the jail of said county.

Said Reynolds on the 10th day of October, 1854, pursuant to notice duly served, made a motion at a special term of the supreme court, held at the court house at Batavia, in the county of Genesee, to set aside said order of arrest upon affidavits. The motion was denied in November, 1854, but the order denying it was entered as of the 10th October.

In May, 1854, the said Reynolds put in an answer to the plaintiff's complaint, denying the first, second, third and fourth causes of action therein, and to the fifth cause of action, he alleged, by way of defense, that the note therein described, was given as a mere memorandum, and not as an absolute obligation. 2d. That the action was barred as to it by the statute of limitations, and 3d, a set-off of \$250.

On the 17th October, 1854, said Reynolds, by his attorneys, served on the plaintiff's attorney, an offer of judgment for the amount due on the note described in the

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complaint, and the offer was accepted on the same day. On the 20th day of the same month, judgment was duly docketed pursuant to the said offer, for the amount therein named, and costs.

On the 14th November, 1854, an execution was issued and delivered to the defendant upon the said judgment, commanding him to collect of the property of the defendant Reynolds, the sum of \$1,019.39, with interest from the date of the docketing of said judgment, that being the amount of said judgment.

On the 13th December, 1854, the said defendant filed the execution with his return thereon endorsed, that said Reynolds had no goods or chattels, lands or tenements in his bailiwick whereof he could cause to be made the amount of said judgment, or any part thereof.

On the 6th December, 1856, an execution against the body of said Reynolds was issued and delivered to the defendant, still being sheriff of said county of Cayuga. On the 28th March, 1857, the defendant filed the said execution in the proper office with a return thereon, subscribed by him as late sheriff of Cayuga county, in which he certified and returned to said process that said Reynolds had been arrested by him under a judge's order at the commencement of the action, and kept in close custody until after judgment in October, 1854, and after execution against his property was received and returned by him in 1854; that he then wrote to the plaintiff's attorney for an execution against the body of the defendant, if he was going to send one at all; but never receiving an answer, he kept said Reynolds until on or about the 1st May, 1855, up to which time no execution was received against him; and about that time Reynolds, claiming that he was wrongfully imprisoned, escaped, and was then (the date of the return), after diligent search and inquiry, not to be found in the county of Cayuga. It was also conceded that said Reynolds was insolvent.

The foregoing facts being undisputed on the trial, the

court ordered a verdict for the plaintiff for the amount due on the judgment against Reynolds, with interest, subject to the opinion of the court at general term sitting in the eighth district. The cause was there brought to argument, and judgment was ordered for the defendant, with costs; and it was from that judgment that the plaintiff appealed to this court. The case was argued by

Mr. Cox, for respondent.

And points were submitted by

G. D. Lamont, on behalf of appellants.

MULLIN, J. This court decided, in *Corwin v. Freeland* (2 Seld. 560), that a defendant was legally arrested on a *ca. sa.* issued after judgment in a cause in which an order of arrest had been obtained and an arrest made before judgment, and which order had not been vacated before the arrest on the *ca. sa.* The action, in that case, was on contract, and the ground of the arrest was fraudulently contracting the debt.

In the case now before us, the action was on contract, and the ground of arrest was the embezzlement of the plaintiff's money by Reynolds, while acting as agent for him. An order of arrest was procured, and Reynolds was arrested by virtue thereof, and such order has not been vacated, but was in full force when the *ca. sa.* was issued to the defendant. There is no distinction between the cases, and we must hold that the *ca. sa.* was regularly issued, and Reynolds liable to arrest thereon, unless there is some other fact in this case, not found in the case of *Corwin v. Freeland*.

The first ground relied on to distinguish the cases is that in this case the order of arrest was obtained upon one only of five causes of action stated in the complaint, and the judgment was not finally recovered on that but upon

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the fifth cause of action, for which Reynolds was not liable to arrest under the provisions of the code of procedure.

It is quite obvious that if a party can be arrested on an order obtained upon an affidavit stating a cause of action for which an arrest may be made, and be imprisoned on a *ca. sa.* issued on a judgment recovered for a cause of action for which an order of arrest could not lawfully issue, the liberty of the citizen may be taken from him under the forms of law, and yet in defiance of the provisions of the statute enacted to protect and secure it. Such a practice, if sanctioned, offers a premium for perjury and fraud. The reckless and unprincipled man can, at any time, procure the arrest and imprisonment of a citizen if he has against him a demand of fifty dollars, arising on contract.

While this would seem to be the result of the doctrine of the case of *Corwin v. Freeland*, yet I apprehend it is no more chargeable with the result, than is any other legal proposition chargeable with unfortunate consequences which parties might by reasonable diligence have foreseen and avoided. Within the case of *Corwin v. Freeland*, the defendant may be arrested on a *ca. sa.* when he was arrested on an order of arrest, although he may not be liable to arrest, or the order ever so irregularly obtained, if he will not move to set it aside before judgment. If he is guilty of laches in making his motion, and is arrested on a *ca. sa.*, he ought not to complain of the case which settles the rule of practice. But the hardship is, that in this case a motion was made and denied, and hence it is insisted that the defendant has done all that he could legally do to protect himself, and yet his imprisonment has been continued after judgment recovered for a cause of action for which he has not been, and could not be arrested.

This misfortune is the result of his own laches, as I will proceed to show.

The defendant's counsel bases his argument upon the

position that under the case of *Corwin v. Freeland*, no opportunity is given to a defendant arrested on an order of arrest to contest the legality of his imprisonment on a *ca. sa.*; that his sole remedy is a motion before judgment to set aside the order of arrest. In this, I think, he is mistaken. He carries the doctrine of *Corwin v. Freeland* beyond the facts of the case, and further than I apprehend it was the intention of the court to go. In that case, no motion had been made to set aside the order of arrest, nor to set aside the *ca. sa.*; hence the only question for the court to decide was, whether the order of arrest remaining in force, the defendant could be legally arrested on a *ca. sa.* The court held he could; and this was only giving effect to section 288 of the code, which provides that no execution against the body shall issue, unless an order of arrest has been served, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179.

In the case cited, the ground of arrest was not alleged in the complaint, and hence the right to arrest on the *ca. sa.* depended on the preliminary arrest on an order of arrest. The case decides nothing as to the course to be pursued in order to get rid of an arrest on a *ca. sa.*; nor does the code make any provision for such a case. The only section of the code that applies to it is section 204, and it declares that the defendant arrested may at any time before judgment apply on motion to vacate the order of arrest, or to reduce the amount of bail. It is the order of arrest the defendant may move to vacate. Whether he can move to set aside the *ca. sa.* is another and different question.

That the defendant may do so when it is issued in violation of the statute, or not in conformity to its provisions, there can be no doubt; but the question is, has the court power to set aside a *ca. sa.* because the party was not liable to arrest, or because a case was not made which justified the issuing of that process, or the proceedings to obtain the order were irregular?

The former practice affords us but very little light on these questions, although the proceedings to arrest on the *capias* are substantially the same as those to arrest on an order under the code, and the proceedings to arrest on the *ca. sa.* are very similar to those prescribed by the code to arrest on execution against the body, yet the questions that arise in this case could not have arisen under the former practice; at least not under that practice as it stood prior to the passage of the non-imprisonment act. That statute opened the way to the difficulties, which, it is alleged, the codifiers have failed to protect parties against.

We are left, therefore, to settle the practice in view of the consequences which experience has shown have resulted, and are likely to result; from the provisions of the code and the adjudications upon them.

It will not do to hold that a party may sue for two or more causes of action, for one of which only the defendant may be imprisoned, voluntarily take judgment for the one for which the defendant may not be imprisoned, and yet be entitled to imprison the defendant on an execution on the judgment. Such a result is a fraud on the law, and can be reached only by restraining the courts from exercising an equitable supervision over their process, and over the officers appointed to execute them.

When an order of arrest is procured, the defendant has an opportunity of contesting the facts on which the order of arrest was issued, but he may be beaten on his motion, and the plaintiff finally recover for a cause of action not only different from that on which the order was obtained, but one for which the party could not, under any circumstances, be arrested. Is the defendant in such case foreclosed? Must he be consigned to jail because the plaintiff has been corrupt or reckless? It seems to me that such can not be the law. There is no statute authorizing any such practice, nor do the provisions of the code, fairly construed, lead to any such result.

Section 179 of the code provides that a defendant may

be arrested in five specified cases. The first three are in *actions* of tort according to the former division of actions. The last two are when the action is not one of tort, but the defendant has been guilty of fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought; or where the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

When the action is for either of the causes of action enumerated in the first three subdivisions of § 179, the facts that authorize the arrest must be stated in the complaint, and when a judgment is rendered in favor of the plaintiff the right to imprison the defendant on an execution is conclusively established. But where the action is for any other cause of action, the facts cannot properly be stated in the complaint, and reference must be had to the affidavit made to procure the order of arrest, in order to ascertain whether the case is one in which the defendant may be arrested on a *ca. sa.*

If the complaint contains one or more of the causes of action, enumerated in the first three subdivisions of section 179, and one or more for which the defendant cannot by law be arrested, the plaintiff is not entitled to an order of arrest, or to imprison the defendant on a *ca. sa.* on the judgment; because the action is not one in which the defendant might have been imprisoned as provided in section 179 and section 181, as required by section 288. By the term *action*, the codifiers intended all the causes of action stated in the complaint, not part of them. In *Brown v. Treat* (1 Hill, 225), the defendants were discharged from arrest on a *ca. sa.* in an action, the declaration in which contained counts in *assumpsit* and *case*, on the ground that by the joinder of causes of action for which a party might be arrested with others for which he could not be arrested, the right to imprison for either was gone. Judge COWEN

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put his decision on a different ground, but Judge BRONSON in *Suydam v. Smith* (7 Hill, 182), considers the ground taken by Justice COWEN as not tenable. He nevertheless approves the decision, putting it on the ground I have suggested, which is doubtless the true one. (*Miller v. Scherder*, 2 Comst. 262.) If an order of arrest is obtained on an affidavit setting forth a single cause of action, and the complaint contains others for which the party cannot be arrested, the order is irregular, and should be set aside on motion, or the plaintiff required to amend his complaint by striking out all the causes of action, except that on which the order of arrest was obtained.

If a motion to set aside the order is not made before judgment, the defendant may be imprisoned on a *ca. sa.* issued on a judgment. But if the judgment is recovered for a cause of action for which the defendant is not liable to arrest, he may then move to set aside the *ca. sa.*, or to be discharged from imprisonment on that ground; because it was manifestly the intention of the codifiers to authorize the arrest and imprisonment of a defendant on a *ca. sa.*, only when the judgment is for a cause of action for which he might have been arrested. It is not necessary that this liability should appear in the record; it is enough that an order of arrest was procured; as the granting of the order is considered an adjudication that the case is one in which the defendant might be arrested. Such I understand to be the views of Justice HOGEBOM, in *Humphrey v. Brown*. (17 How. Pr. 481.) In *Pope v. Newcomb*, the general term of the fifth district decided that a defendant might move after judgment to be discharged from arrest on a *ca. sa.*, on the ground that the affidavit on which the order of arrest was granted was fatally defective. The motion had been made before Justice ALLEN and denied, and the case came before the general term on appeal from his order. The court were of opinion that the case of *Corwin v. Free-land* did not reach the question. That it was the right of the defendant to apply to be relieved from imprisonment

on a *ca. sa.*, although he may have applied to set aside the order of arrest and his motion had been denied; that the requirement of the code, that the motion be made before judgment, applied only to the motion to set aside the order of arrest, and that it was the right of a defendant to contest the right to imprison him on a *ca. sa.*, whatever might have been the merits of the application to set aside the order of arrest. That every court of general jurisdiction had power, unless restrained by some positive statute, to regulate and control its process and officers so as to promote the ends of justice, and to protect the liberty of the citizen.

In this case, there had not only been an order of arrest in full force at the time the *ca. sa.* was issued—which of itself justified the imprisonment on the *ca. sa.*—but the complaint brought the case within the 3d subdivision of section 179 of the code. The first cause of action being for money embezzled by the defendant as the plaintiff's agent, furnishing thereby an additional ground on which to justify his imprisonment.

The remedy of Reynolds was to move to discharge him from imprisonment after judgment, and not having done so, his imprisonment was regular.

The delay of the judge to issue a *ca. sa.* entitled the defendant to a supersedeas. (3 R. S. 5th ed. 870, § 38.) That section provides that when any defendant, at the time judgment shall be rendered against him in any court of record, shall be in the custody of a sheriff or other officer, upon process in the suit in which judgment shall have been rendered, the plaintiff shall charge such defendant in execution therein within three months after the last day of the next term following that in which the judgment shall have been obtained. The next section provides that if the plaintiff is not so charged, he is entitled to a supersedeas, to be allowed by a judge of the court in which the judgment was rendered. If these provisions are in force (as to which there may be some doubt, in view of section 283 of the

code, which gives to the party in whose favor the judgment is entered four years from the entry of such judgment within which to issue executions, as provided in the 9th title, of which said section 283 is a part), the defendant's remedy was to apply to a judge for a supersedeas, on the ground that he was not charged within the time limited, or by motion to the court. Having done neither, the imprisonment was regular.

If I am right in holding that if the imprisonment was irregular, it was the duty of the defendant Reynolds to get rid of it by motion, and that not doing so, the arrest and detention were valid, it follows that the defendant became liable on the escape of the prisoner, either as bail or in an action for the escape. The order of the court held Reynolds until he was charged on the *ca. sa.*, and the imprisonment being lawful, the sheriff became liable for an escape.

Section 201 of the code provides that if a defendant escape after being arrested on an order, the sheriff shall himself be liable as bail. The common law gave an action against the sheriff for an escape, and the existence of such an action is recognized by § 94, which limits the time for bringing such an action to one year.

The plaintiff has an election which of these remedies he will adopt, and that election is manifested by the complaint. If he proceeds against the sheriff as bail, he must set forth the proceedings to and including the escape, and allege that the defendant is bail; and it must demand the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendant as bail would be omitted, as wholly irrelevant to the cause of action for the escape.

The complaint in this case makes no mention of the defendant as bail; there is not a word in it manifesting an intention or election to hold him liable in that character. I am of the opinion, therefore, that it is to be treated as an

action for an escape, and that the limitation prescribed by section 94 for bringing the action, to one year applies. The only evidence as to the time of the escape is contained in the return of the sheriff to the *ca. sa.*, and by it the escape occurred on or about the 1st May, 1855, and the action was not commenced until the 19th November, 1857. I am, therefore, of the opinion that the action was barred.

It being shown that Reynolds was totally insolvent, the plaintiff was not entitled to recover the whole amount of the judgment against Reynolds. In actions for escape from imprisonment on mesne process, it was always competent to give in evidence the circumstances of the debtor, in order to limit the recovery to what the plaintiff had actually lost. (Graham's Practice, 419, and cases cited; *Russell v. Turner*, 7 J. R. 189.)

We cannot say how much the plaintiff was entitled to recover, but we can say that on the evidence it was impossible that the plaintiff could have lost, by reason of the escape, his whole debt.

I have omitted to allude to the proposition in the respondents points, that the plaintiff, by accepting the offer of judgment on the note, ceded away his right to have the action considered as an action of tort, and therefore he was not liable to imprisonment.

Up to the recovery of judgment he was held on the order of arrest, which must be now treated as regular. It was so held to be on motion, after hearing the parties. If it became void or irregular, it was by reason of the entry of the judgment on the note instead of on the count for embezzlement. But the statute does not make the right to continue the imprisonment after judgment and before the *ca. sa.* issues depend on the judgment. It rests exclusively on the order, and that, I suspect, must be held to be regular for the purposes of this case. It would have been competent for the defendant to have moved after the entry of judgment to set aside the order of arrest, showing to the court that the judgment was recovered on a cause of

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action for which he could not have been arrested; and hence that he could not be legally imprisoned on a *ca. sa.* on such judgment. The court would have granted the motion. But the misfortune is that Reynolds suffered the order of arrest to remain in force—thus legalizing his imprisonment—and took his remedy by means of an escape instead of by motion. He, and not the law, is to blame for the consequences of his mistake.

I am in favor of affirming the judgment of the general term, on the ground that the action is barred by the statute of limitations. But, if my brethren shall differ with me on this point, I am then in favor of reversing the judgment and ordering a new trial on the ground that the measure of damages was erroneous.

DAVIES, J., read an opinion in favor of reversal and judgment on the verdict. All the other judges being for affirmance, judgment affirmed.

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SILAS L. MERRILL v. MOSES H. GRINNELL and ROBERT B. MINTURN.

The baggage of a passenger, entrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked, is under the same protection as the goods which are entrusted to a common carrier of goods.

A proper sum of money, for traveling expenses, contained in the trunk of a passenger, is to be considered as a part of his personal baggage, and may be recovered for, as such.

The amount must be measured not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey; and includes such an allowance for accidents or sickness, and for sojourning by the way, as a reasonably prudent man would consider it necessary to make.

Whether the amount claimed, in the case of a loss, is reasonable or excessive in a particular instance, must depend upon the character of the journey and the special circumstances of the case.

It should be limited to money taken for traveling expenses properly so called.

The question as to the reasonableness of the amount of money carried by a passenger in his trunk, for his traveling expenses, is one to be determined by the jury, or by a referee; and if it has been passed upon by a referee, in a given case, his decision should not be disturbed.

Opinions of witnesses may be received as to the value of chattels, and a witness who has been in this country five years may be allowed to testify as to the value of the contents of a trunk, from knowledge acquired since he came to this country, and to prove that he has made inquiries here as to the value of articles of that kind.

A right of action against a common carrier to recover the value of property entrusted to him, is assignable; and the assignee may sue in his own name.

The liability of a carrier, for the baggage of a passenger, is the same as for freight. He is liable as insurer for both.

Appeal by the plaintiff from an order of the Supreme Court awarding a new trial, where judgment had been given against the defendants on the report of a referee.

THE action was brought to recover the value of a trunk and its contents, consisting of clothing, money and some other things, which it was alleged one Eugene Strachwitz delivered to the defendants, as common carriers, on the

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high seas between Liverpool and New York, on board their ship Liverpool, to be carried from the city of Liverpool to New York, for a reasonable compensation; which duty, it was alleged, they neglected to perform; so that the trunk and contents were wholly lost to Strachwitz, the owner. The plaintiff was the assignee of the demand, under a transfer executed by Strachwitz. The answer admitted that the defendants were the owners of the vessel, but traversed the other allegations by a statement of want of knowledge sufficient to form a belief. The case was first tried in November, 1855, when the plaintiff was non-suited. The last trial was in August, 1857.

The conclusions of fact of the referee affirmed that the defendants were the owners of the ship Liverpool, and were engaged as carriers in the business of transporting emigrants from Liverpool to New York; that Strachwitz was an emigrant passenger on the ship from Liverpool to New York, leaving the former port about the first of August, and arriving at New York the 15th of September, 1852; that he purchased a ticket of one Rickerts, an agent of the defendants at Hamburg, for the transportation of himself and his baggage from Hamburg to New York, *via* Hull and Liverpool, for thirty-six dollars; that his baggage consisted of a black leather trunk and its contents, and some other articles; that at the time of purchasing said ticket said Rickerts saw said trunk and inquired of Strachwitz whether it contained valuables, and was informed that it did; that Strachwitz, with a number of other emigrants, went, under the charge of a servant of Rickerts, on a steamer from Hamburg to Hull and on the railroad from Hull to Liverpool, using said ticket as evidence of his right to passage; that, at Liverpool, the ticket was exchanged by direction of the servant of Rickerts, without additional payment, for another, which was received by the officers of the Liverpool in full payment of the transportation of Strachwitz and his baggage from Liverpool to New York; that on Strachwitz's coming on board, the

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officers of the ship took possession of the trunk and its contents, lashing said trunk to the center of the steerage, where at times said Strachwitz had access to it and at other times had not; that said trunk and its contents were, without his fault, stolen on the voyage and lost to him; that during the voyage and on arrival at New York, Strachwitz demanded the trunk of the mate and other officers of the ship, but they neglected and omitted to deliver it, and he has never received it. The referee set out a list of the contents of the trunk, with a valuation of the several items. Among them were \$800 in money, in gold, six dozen of shirts, and other clothing in large quantities, two swords valued together at \$68, and some other articles, making, in all, the value of \$1,991.27. The referee further found that said Strachwitz, just before his departure from Hamburg, was an officer in the Prussian military service; that the articles of wearing apparel mentioned in the list were in quality and number such as were accustomed to be possessed and owned by persons in his condition in life by the custom of the country where he resided, and that the other articles were suitable for a person in his station in life; that said Strachwitz left Liverpool with the intention of proceeding to San Francisco, California, and that he placed said gold coin in said trunk to defray the expenses of the journey.

The referee found that Strachwitz had assigned his demand against the defendants to the plaintiff for a valuable consideration; and, as a conclusion of law, determined that the plaintiff was entitled to recover the value of the trunk and property, with interest from the time of the arrival of the vessel in New York, the amount being \$2,346.91.

The findings were duly excepted to by the defendants' counsel.

It appears by the case that certain exceptions were taken in the course of the trial, and that the defendants also excepted to the refusal of the referee to non-suit the plaintiff.

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It further appears by the opinion of the supreme court that the new trial was granted on the sole ground that a passenger was not entitled to recover for *money* carried in a trunk which was stolen. The order, however, declared that the reversal was on account of error of fact as well as of law.

The plaintiff appealed from the order of the general term, giving the usual stipulation required in such cases.

J. H. Reynolds, and John C. Strong, for the appellant.

J. Larocque, for the respondent.

DENIO, Ch. J. The case is presented by the record in a form which requires us to review the conclusions of fact as well as the determination of matters of law. The questions are therefore substantially the same as those which would arise upon a motion to set aside a verdict or report, as being against the weight of evidence and against law.

The defendants' counsel insists, in the outset, that the whole cause of the plaintiff is false and fabricated; that he was not a passenger on the defendants' vessel upon the voyage mentioned, and did not lose any property in the manner claimed. The evidence certainly presents some circumstances of a remarkable, and, at the first view, of a suspicious character. Strachwitz himself is the only witness who gives any evidence of his possession of the property in question, of his departure from Germany, or as to his presence on the vessel during any part of the voyage described by him; and he was not able to produce any document or paper, of any kind, showing his connection with the vessel or any of its officers, or the other passengers. In addition to this, the defendants produced what they claimed to be a correct list of the passengers in the vessel, upon that voyage; which was to a certain extent verified by the master, as a witness, on the trial, and which, although it embraced more than five hundred names, did

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not contain that of Strachwitz, nor any one resembling it, or which might be mistaken for it. Moreover, the master, who was examined on behalf of the defendants, denied having seen Strachwitz during the voyage, or at its termination, or at any time until shortly before the trial. With all these disadvantages, he was able to convince the intelligent referee, before whom the issue was tried, of the integrity of his statements, and of the general truth of his narrative. His account was substantially as follows: He said he was a native of Namslau, in Prussia; that after receiving a good education he commenced life as a common soldier, in the Prussian service, though he was the son of noble parents, his father being a baron and a person of considerable property; that he was raised to the rank of lieutenant, and, at the commencement of the year 1852, was stationed at Spandau with a part of his regiment; and that he there engaged in a duel with his captain, who was wounded, which circumstance compelled him to leave the country; for which purpose, with the assistance of some friends, he proceeded to Hamburg by the way of Lansdorff and Berlin, with the purpose of embarking for San Francisco. The money and clothing which he claims to have lost, were furnished by his relatives or on their credit. That there was no vessel going from Hamburg to California, and he was advised to sail for New York, which he concluded to do; that he was taken by a waiter in the hotel where he lodged to the office of one Rickerts, who represented himself as authorized to sell tickets for passage from Hamburg to New York; that he purchased a ticket for New York, for which he paid \$36; that Rickerts changed his money, which was in Prussian currency, into American coin, and furnished him with a bag in which to put it; that Rickerts saw the witness's trunk, and that the conversation respecting it took place as mentioned in the findings. There were other Germans who were also going to New York, and Rickerts sent a servant with them and the witness, and they proceeded in a steamer to Hull, and

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thence by rail to Liverpool—his ticket, purchased of Rickerts, serving him instead of payment of the fare. At Liverpool, this ticket was, by direction of the servant, exchanged for one for the ship Liverpool, which was done at an office on shore; that he then embarked on the ship; and that before sailing the passengers were assembled on the deck and required to show their tickets, after which they passed into a space formed by stretching a rope across, and from thence passed into the steerage. The witness said he showed the ticket he had received at Liverpool, passed into the open space, and was not required otherwise to pay for his passage; that the ticket was given up to the officer of the ship; that during the voyage an Irish passenger had his coat stolen, and search for it was made, and the witness, among others, was obliged to open his trunk, and it was examined in the presence of the doctor, the second mate, and the ship's boy, and, he said, they seemed to be surprised at its contents. The following morning, early, the witness missed the trunk. It was present, and he had been sitting on it, till he retired. He complained to the first mate, and demanded his trunk of him, and some search was made among the sails, and in the boxes of the sailors and steerage passengers, but no vestige of the trunk or its contents was found, except a leathern segar box which had been in the trunk; and nothing had been heard of it since.

On the arrival of the vessel in New York, he said he endeavored to communicate with one of the small boats which surrounded the vessel, but they were not permitted to come near enough. A steamboat came alongside, and the doctor and passengers went ashore. The captain at the same time went ashore in a small boat. The witness was requested to leave the vessel, but he declined to go unless they would give him his trunk, but he was finally forced on board the steamboat, and taken ashore. He applied, in the first instance, to Mr. Schmidt, the Prussian consul, who advised him to go to a lawyer, which he did,

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taking along a person who could speak English and German, but the lawyer required him to advance ten dollars, which, having lost everything, he was unable to do. Finally the German society gave him a railroad ticket to Buffalo, whither he went in three days after his arrival, and he has not been in the city since. Since then he has had employment for some time as a private tutor in the family of a farmer, and after a time he was introduced to the plaintiff's attorney, and wrote or studied in his office as a clerk. It was thought advisable, he said, that he should transfer his claim to some other person, on account of his having to be a witness, and the plaintiff was suggested as a proper person. He is a relative of the wife of the plaintiff's attorney. He sold it to the plaintiff for \$1,500, and received his note, which is still unpaid.

The foregoing is only an outline of the testimony of Strachwitz, who was examined and cross-examined at very great length, upon many facts and circumstances of his personal history not material, except as to his credibility. His testimony appears to me to contain a natural and not improbable narrative of the events as to which he was examined. It was either true in substance or ingeniously contrived.

But he was confronted with the alleged list of passengers, and the absence of his name among those recorded there is a circumstance of great weight against him, if the paper is truly a list of the passengers, as it was claimed to be. But I think it is not. The document is headed: "Report and manifest of the *cargo* laden on board the Liverpool, whereof William P. Gardner is master," &c. It contains five hundred and one names, and opposite many of the names is the words *one box, two boxes, &c.*, specifying the number, and amounting, in one instance, to as many as seventeen boxes. Where no entry of boxes is placed opposite a name, there is a mark (") such as in inventories and bills of parcels generally indicates that the number is the same as the last preceding entry. But such does not

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seem to be the precise meaning of this list. The mark usually denoting iteration means here that the persons, opposite whose name it is placed, have a certain connection with the boxes, last entered, as belonging to the same family or party. Thus, taking one case for an example, the entry is:

Edward McCormick, two boxes.

Eliza " "

Sarah " "

Margaret " "

The family name of all the parties thus set down as the owners of one or more boxes, are not always the same, but the instances of that are sufficiently frequent to show the general intention of the entries. There are two instances where the marks of iteration are omitted, but it is easy to see that this was a mere error of transcribing or printing, the identity of name showing that they formed the same family group as in the other cases. The purpose of the paper was not, therefore, I believe, to have a list of all the passengers' names, but an account of the parcels imported, and the names of the emigrants claiming those parcels. This is apparent from the *heading* of the document which I have already referred to, which entitles it "a report and manifest of *the cargo*," &c., without any reference to the names of the passengers. The master's oath, which is required to be delivered at the same time with the manifest, and which was given in evidence upon the trial of this case, omits any mention of passengers, and in no manner affirms anything on that subject. But if the provisions of law were observed as to this ship, in regard to the importation of emigrants, there was a distinct manifest of passengers altogether different from the vague paper which was given in evidence. For an act of congress, approved March 2, 1809, (3 Stat. at Large, 488,) contains an explicit direction which, on account of its important bearing upon this branch of the case, I transcribe: "§ 4. And be it further enacted that the captain or master

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of any ship or vessel arriving in the United States, or any of the territories thereof, from any foreign place whatever, at the same time that he delivers a manifest of the cargo, and if there be no cargo, then at the time of making report or entry of the ship or vessel, pursuant to the existing laws of the United States, shall also deliver and report to the collector of the district in which such ship or vessel shall arrive, a *list or manifest of all the passengers* taken on board of the said ship or vessel at any foreign port or place; in which list or manifest it shall be the duty of the said master to designate particularly the age, sex and occupation of the said passengers respectively, the country to which they severally belong, and that of which it is their intention to become inhabitants; and shall further set forth whether any and what number have died on the voyage, which report and manifest shall be sworn to by the said master in the same manner as is directed by the existing laws of the United States in relation to the manifest of the cargo; and that the refusal or neglect of the master aforesaid to comply with the provisions of this section shall incur the same penalties, disability and forfeitures as are at present provided for a refusal or neglect to report and deliver a manifest of the cargo aforesaid." It seems to me highly improbable that the duty prescribed by this provision was omitted in the present case where so large a number of foreigners were brought into the country. The government, it is known, assumes to obtain statistics of the emigrations of persons by sea into the United States, and for that purpose provides statistical tables showing the nationality and the place of embarking and other particulars in regard to the emigrants arriving upon our shores. None of these things, it is obvious, are shown by the imperfect paper which was produced by the counsel for the defendants. That paper had, however, an appropriate office quite distinct from that of furnishing a manifest of passengers, as may be seen by a reference to other provisions of the revenue laws. The "wearing apparel and other personal baggage,

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and the tools and implements of a mechanical trade," of persons who arrive in the United States by sea, are declared free and exempted from duty, but an entry is to be made of them before a permit for landing can be granted; but the collector, instead of requiring a formal entry, may send an inspector or surveyor on board to examine the passengers' baggage and make report of it. (Act of 1799, 1 Stat. at Large, p. 627, § 46.) In practice, I believe, one of these officers makes a cursory examination of the trunks and boxes of the passengers, and allows them to be taken on shore without any formal entry. But there is a clause in the oath which the master is required to make, on delivering his manifest to the collector, to this effect: "that no *package whatsoever* of any goods, wares or merchandize have been unladen, landed, taken out, or in any manner whatsoever removed from on board, except such as are more particularly described and declared in the *abstract or account herewith*," &c. (Id. § 30.) The oath of the master, which was given in evidence, contains this clause in the precise language of the act of congress. Where, therefore, goods, which would include passengers' baggage, have been taken on shore upon the summary examination of an inspector, without a formal entry, it is necessary for the master to deliver, with his manifest of cargo, this abstract or account. The names of passengers having baggage, and a statement of the boxes or parcels in which it was contained, would perhaps sufficiently answer this requirement. A compliance with this provision was, I am inclined to think, the purpose of the paper which is claimed to be a manifest of passengers. It was an account of this part of the cargo, which had been delivered without other authority than the summary examination of an inspector, and which was excepted out of the otherwise general oath of the master, that nothing had been removed.

Now, when this vessel arrived in New York, Strachwitz had no trunk to be removed, if, as he testifies, it had been stolen on the voyage. If the officers of the ship had

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acknowledged the loss, they might properly enough have included his name and inserted an entry of his trunk on the list as a package which had been removed. But they had not done this; but, on the contrary, had repudiated his claims and forced him off the vessel without giving him any satisfaction respecting his property. He was in their view simply a passenger who had no trunk or box of which an account was required. His name, upon their theory, had no place on the list of passengers having baggage, and it would naturally have been omitted. Its absence, therefore, affords no presumption that he was not a passenger. If the defendants had produced the manifest of passengers authenticated according to the act of congress, it would, as a cotemporary document required by law to be made, have been presumptive evidence against the plaintiff upon the question of Strachwitz having been a passenger. It would not, of course, have been conclusive, as it would not have been in the power of the master to conclude him by an *ex parte* statement and affidavit.

There was no satisfactory verification of the statement arising out of the testimony of the master. Only a part of it was in his handwriting, and what he did write was upon the information of others. He does not profess to have seen or known anything of the steerage passengers. Nor does he say anything, of his personal knowledge, respecting the presence or absence of Strachwitz. If he was able to say positively that there was no complaint that a trunk had been missed during that voyage, it would be something. But all he can say is that he does not know of the doctor and mate making search for lost baggage, but he declares that it was very common to have such searches. He cannot recollect the name of the doctor or second mate.

Upon the whole I do not find anything in the document produced, or in the testimony of the master which should materially impair the credit to be given to the oath of Strachwitz. I have already said it was not confirmed by any other witness, or by any document. But for some con-

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siderations which I am about to mention I should say the case depended wholly upon his testimony.

There are however in the testimony some coincidences which tend, I think, to confirm to some extent the evidence of Strachwitz. He was the first witness sworn, and his direct examination brought out a brief statement of his embarkation and arrival in New York and the loss of his trunk, and a description of its contents. He was cross-examined by the defendants' counsel apparently for the purpose of finding matter upon which he could be contradicted. It was a perfectly legitimate method of testing his credibility. It correctly assumed that it would be difficult for him to describe the incidents of a voyage if he was not on board the vessel, and that one who commanded the ship could readily confute him, if his story was a fabrication from beginning to end, as it was claimed to be. He was cross-examined upon this sensible system, and seems to have been required to mention any noticeable incidents which occurred during the voyage. Among others, he stated this: that he saw the captain's steward cruelly beaten by the hands and heels of the captain. There is no reason to suppose that such a circumstance would be an ordinary or common event in a packet ship. Strachwitz presumed to swear to it, with a knowledge that the master was present and was to be examined. It was a matter personal to him and one not likely to be forgotten. It was a thing which Strachwitz could not have known unless he was on board. What the master says on his examination, after having heard this testimony of Strachwitz, is this: "I believe I had a difficulty with my steward. * * Very likely I ordered or *inflicted* personal chastisement of this steward, but I do not recollect it; probably I did it if he deserved it. I will swear nothing about it." Question—"Will you swear that you did not do it by kicking." Answer—"I will swear nothing about it." In a subsequent part of his examination the master stated that he went to Canada three or four weeks after the ship reached New York. He said

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he did not *know* that he was prosecuted by the steward, but he said at last "I went *perhaps partly* on account of such prosecution." Now the degree of severity with which the steward was punished, if he was punished, or whether he deserved to be punished, is immaterial to the present question. The point is whether Strachwitz was able to state a circumstance of an unusual nature transpiring on board the ship, which is shown by the defendant's testimony to have actually taken place. If he *could* do so, he must probably have been present; and I think he did.

Again, Strachwitz testified that during the voyage a sailor was obliged to run round the deck in a circuit. At the four corners were placed officers of the ship with pointed sticks, and stabbed him as he passed, three or four black fellows with ropes, and knots in them, following him, striking with the ropes until he fell down, and the captain struck him in the mouth with his heels. When interrogated, the master said he heard that a man was run round the ship, stabbed and struck, but did not see it. Such a thing, then, occurred during the voyage. That is sufficient to identify the transaction. The compelling a man to run round the ship, and to be beaten and stabbed, could not often occur, unless shipmasters are more brutal than is generally supposed. It did occur, or was said and believed to have occurred on this voyage according to the testimony of the master. Strachwitz says he saw it, which he could not have done unless he were present. It is not to be supposed that he invented such a story in pure wantonness and that it turned out to be true. Whether the captain saw it the took part in it, as Strachwitz says, or not, is not important. That is a question of veracity between the two witnesses, not material to the main issue; but the substantial identity of the transaction which, by the master's admission, was said to have taken place, and which Strachwitz says he saw, proves, or very strongly tends to prove, that Strachwitz was a passenger on that voyage. There are two other occurrences about equally pertinent,

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and several where the facts might have occurred on any voyage, and which, therefore, Strachwitz might have invented. The two instances which I have mentioned present some of those undesigned and unpremeditated coincidences which show the truth of a narrative more satisfactorily than a considerable amount of positive evidence. If Strachwitz was not a passenger, his statement of these transactions, which are shown to have taken place, must have been a pure invention. That they turned out to be true, if not literally, in such a sense, at least, as to substantially correspond, shows that Strachwitz's story was not a fiction, but was true so far as he asserted that he came to this country on that ship and on that voyage.

There is one other circumstance to be adverted to before closing this part of the case. These persons, Strachwitz and the master, saw but little of each other on board the ship, if the former was actually there. The inability of the master to recognize Strachwitz proves nothing, as he may never have noticed him on board. But the master held a position which would render it probable that his person would be known and remembered for some time by every passenger. It is conceded that these persons had not seen each other from the time of the arrival of the vessel in New York, until about the close of the first trial, almost three years afterwards. Mr. Babcock, a witness for the defendants, who was their counsel on the first trial, swears that immediately upon his coming into the room Strachwitz exclaimed *that is captain Gardner of the ship Liverpool*. There is no evidence that he had been otherwise informed of his identity with the master.

Some discrepancies were shown upon immaterial matters between the statements of Strachwitz made on the first and the second trial, but they were not of a nature in my opinion to shake his credit.

In determining disputed questions of fact, left doubtful upon the actual evidence, it is sometimes useful to inquire upon which party the onus rests to clear up the difficulty

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and dispel the doubt; and the general rule is that it is upon the party who possesses to the greatest extent the means of doing so. If I am right in supposing that there exists in the collector's office an authenticated list of passengers, sworn to by the master according to law, the defendants, whose officers prepared and delivered it at the custom house are the parties who should have procured and produced it. They had sufficient notice that the plaintiff would give *prima facie* evidence that Strachwitz was a passenger, for he had sworn to it on the first trial. They proposed to attack that evidence and to convict the witness of perjury and fraud. They were bound, I think, to obtain and give in evidence the manifest of passengers. It was scarcely fair to leave that behind and rely upon the other paper which does not profess to have been made up for that purpose. Then they called as a witness an officer of the ship, who, though first in rank, had the least to do with the steerage passengers, and who was not at all likely to have known Strachwitz if he really came over in the steerage; and they called no one who was at all conversant with that class of the passengers. The plaintiff, it is true, could have sent a commission to Germany and might possibly have shown the circumstances of his departure from that country, and thus have corroborated him. So it is probable that sufficient exertion would have enabled the plaintiff to find some of the German passengers, twelve or thirteen in number, who came over at the same time and might have remembered Strachwitz. It does appear from Strachwitz's testimony that he had made ineffectual enquiries for one of those. If he was honest and was really a passenger, as he says, he could not know and would not be likely to suspect that his statement that he was on board would be questioned. The first trial had not gone far enough to disclose that, as the plaintiff was non-suited on his own evidence.

I conclude that there was other evidence readily obtainable by the defendants, if they are right in the controversy, which they have neglected to produce.

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Upon a careful examination of the testimony, I am of opinion that the referee came to a correct conclusion upon the main questions of fact. That Strachwitz sailed in the ship Liverpool on the voyage mentioned I do not at all doubt. That his trunk contained all the valuable things which he mentioned, we have only his testimony, given, I admit, under circumstances which create a suspicion of interest on his part. But the referee has believed him, and I see no ground for reversing that determination. He had some advantages which we do not possess. The cases are rare in which it would be proper to set aside the determination of the primary tribunal upon a question of fact depending upon the credibility of a witness not impeached or successfully contradicted.

Whatever doubt may formerly have been entertained, it has been settled, for a considerable time, that the baggage of a passenger, entrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked, is under the same protection as the goods which are entrusted to a common carrier of goods. (*Percell v. Meyers*, 26 Wend. 591.) That case having been determined by the court for the correction of errors, no further authority is needed, than the opinions of the members of the court and the prior cases on which they rely. The only question upon which any uncertainty remains is, whether a proper sum of money, for traveling expenses, contained in the trunk of the passenger, is to be considered as a part of his personal baggage; and this is less clear than the former proposition upon the cases in this state. Assuming it not to have been adjudged, but to depend upon the reason of the thing and upon legal analogies, I am of opinion that it should be regarded as a part of the baggage. The reason why property of any kind is included in the contract of carriers of persons, is that it is the universal, or very usual, concomitant of a journey, whether by land or water, for the traveller to take traveling conveniences along with him. In the infancy of society, and now

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among barbarous people, persons may perform journeys without a change of raiment, and may rely upon charity or rapine for the means of subsistence. But this is all different now with us; and men who engage in the business of transporting persons from one part of the country, or of the world, to another, must make provisions for carrying also whatever may be reasonably necessary to the traveller, under ordinary circumstances, for the prosecution of the journey, or they will be wholly without employment. Nothing, of course, can be more essential to this end than an adequate supply of money for traveling expenses; and the amount must necessarily be measured, not alone by the requirements of the transit over a particular part of the entire route, to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey, and include such an allowance, for accidents or sickness, and for sojournings on the way, as a reasonably prudent man would consider it necessary to make. Whether the amount claimed in the case of a loss would be reasonable or excessive in a particular instance, would depend upon the character of the journey and the special circumstances of the case. It is very clear that it would not include funds carried for the purpose of transportation or remittance, or for investment in another locality. It should be limited to money taken for traveling expenses properly so called. When thus limited, the principle does not involve any departure from the rule that the liabilities of the carrier are imposed in respect to the compensation paid, but is in strict accordance with that principle.

The rule, as I have stated it, though not affirmed by express adjudications in this state, is not controverted by any adjudged case in the superior courts, but is more consonant with the general indications of judicial opinion than the one which would exclude money from the category of traveling conveniences. In *Hawkins v. Hoffman* (6 Hill, 586), Judge BRONSON expressed a doubt whether a reasonable sum for traveling expenses, carried in a passen-

ger's trunk, could be included in his baggage. The case did not involve any such question, and the remark was quite incidental and wholly obiter. The journey which was under consideration was a short inland one, and the judge's idea was that money for expenses was, in such case, usually carried on the person of the traveler. I think the remark scarcely accords with common experience in the case of long journeys, and it certainly does not, where the voyage is by sea and extends from one hemisphere to another, as was the fact in the present instance. In *The Orange County Bank v. Brown* (9 Wend. 85), NELSON, J., in the same incidental way, had intimated that a reasonable sum for traveling expenses could, in such cases, be recovered for. In *Weed v. The Saratoga & Schenectady Railroad Company* (19 Wend. 534), a sum of \$285, contained in a traveler's trunk, was recovered for, under a charge in which the reasonableness of the amount was submitted to the jury; and Judge COWEN prepared and delivered an opinion for denying a motion for a new trial, expressly approving of the manner in which the question respecting the money had been left to the jury. The other judges did not express any opinion upon that point; but a new trial was granted for another cause, namely, that the money did not belong to the passenger, but to another person for whom he was the bailee. In *Taylor v. Monnot*, in the superior court of New York (4 Duer, 116), the question under consideration arose collaterally. The action was brought against the keeper of a hotel, by a lodger whose portmanteau had been broken open and \$353.54 in money contained therein stolen. The law was assumed to be that a traveler, whose trunk had been lost, could be a witness, from necessity, in his own action against the party liable to respond, as to the contents of the trunk, on the ground that no other person would be likely to know the same; but only in respect to personal baggage; and hence the question arose whether the money in question came under that denomination, the owner, who was the witness, being

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upon a journey from Europe. It was held by the court, upon a full examination of the precise question we are now considering, that it did. In Massachusetts the question is definitely settled by the case of *Jordan v. The Fall River Railroad Company* (5 Cush. 69). The sum of \$325, placed in the trunk of a traveler, which was lost upon a very short journey, was recovered. The judgment was sustained by the court. Similar decisions have been made in Ohio, Tennessee, Illinois and Indiana, and in the court of common pleas of the city of New York. (9 Humphrey, 61; 11 id. 419; 10 Ohio, 145; *Davis v. Michigan Central Railroad Co.*, 22 Ill. 278; *Doyle v. Keyser*, 6 Ind. 242; *Duffy v. Thompson*, 4 E. D. Smith, 178.)

I am of opinion that the report of the referee in this case was not impeachable for including the \$800 in coin contained in Strachwitz's trunk. He necessarily passed upon the reasonableness of the amount, and I see no ground for questioning his judgment.

What remains to be said relates to certain specific exceptions taken on the trial.

Strachwitz, when called as a witness, was objected to, and the only ground specified, in the first instance, was that no sufficient notice of his examination had been given. As section 399 of the code stood when the trial took place, no notice was necessary unless the person proposed to be examined was either a party to the action or a person for whose immediate benefit the action was brought. The proposed witness was not a party, and there was then no ground for saying that the action was brought for his benefit. But, immediately afterwards, the defendants' counsel proposed to examine him preliminarily "as to his interest as a witness." The objection of interest, on the question of competency, having been abolished, there was no propriety in such a preliminary examination. It was not proposed to show that the action was for his immediate benefit. The language in which the offer was made would not suggest such an idea.

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The defendants' counsel excepted to the ruling of the referee, by which Strachwitz was allowed to testify as to the value of the trunk from knowledge acquired since he came to this country; and to proof, by him, of the fact that he had made enquiries here as to the value of articles of that kind. Opinions of witnesses are received upon questions as to the value of chattels. The witness had been in this country five years, at the time of the trial. I think he was competent to speak of the value of the trunk here, and that there was no error in allowing him to state the means of knowledge which he had acquired.

The quantity of linen clothes which Strachwitz swore was in his trunk, was much larger than gentlemen in this country are accustomed to carry on a journey however remote, or to possess. The circumstance tended in some degree to discredit his testimony. To obviate this, the plaintiff was permitted to prove a custom prevailing in Germany, by which large quantities of such clothing were accustomed to be kept by individuals. The reason of this is said to be that the washing is done much less frequently than with us, and hence the quantity of linen kept for use must necessarily be increased. I think it was competent thus to account for what seemed peculiar in the contents of the trunk.

The objection based upon the alleged discrepancy between the complaint and the case as proved, was not well taken. Whether the duty alleged to be violated was to carry the trunk as freight, under the ordinary contract with a common carrier or as the baggage of a passenger, the obligations of the defendants were precisely the same. I am of opinion that under the former rules of pleading the evidence would have been admissible, as the obligation would have been correctly stated, and the consideration alleged only in a general way. But if I am mistaken in that, the fault was simply a variance in stating the consideration. The present practice requires such variances to be disregarded unless an affidavit is made according to the

code. (*Catlin v. Gunter*, 1 Kern. 368.) It did not present the case of a failure of proof.

There was sufficient evidence of the agency of Rickerts. The officers having charge of the defendants' vessel recognized the ticket which Strachwitz presented on board. That, although not the one which was received from Rickerts, was a ticket which was obtained by an exchange of the other, effected through the agency of Rickerts, by the person he employed to accompany the emigrants from Hamburg. There is not the slightest evidence that he was himself engaged, on his own account, in any business of transporting passengers to America. The inference from the testimony is that he professed to be authorized to contract for passages in behalf of the several carriers between Hamburg and New York. The defendants' officers recognized the engagement he had made with Strachwitz.

It was objected on the argument that the demand was not assignable. There was no such point made on the trial; but it would not have been tenable if made. The assignability of such causes of action has frequently been affirmed in this court. (*McKee v. Judd*, 2 Kern. 622; *Waldron v. Willard*, 17 N. Y. 466.)

There is no ground for saying that a fraud was committed by Strachwitz in concealing or misrepresenting the contents of the trunk. He answered truly the enquiries of Rickerts, so far as they called for information on that subject. Besides, if I am right in supposing that the property and money in the trunk fell within the fair meaning travelers' baggage, it is precisely what the defendants undertook to carry, and they cannot pretend that they were deceived into attempting to carry something more.

There were some other points made on the motion for a non-suit which do not call for any particular remark. I think neither of them were well taken.

My conclusion on the whole case is that the report of the referee was right, and that the supreme court fell into an

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error in ordering a new trial. The order appealed from should, therefore, be reversed, and the judgment entered on the report of the referee be affirmed.

MULLIN, J. A new trial was granted by the court below solely on the ground that the referee gave judgment in favor of the plaintiff for the \$800 in gold, found to have been in the trunk at the time of its loss. GROVER, J., puts himself exclusively on this ground. And, although MARVIN, J., discusses several other questions, and expresses doubts whether the referee did not err in deciding some of them, yet he finally concurs with Justice GROVER for reversal upon the ground taken by him. This being so, we must consider all the other questions raised on the trial to have been decided in favor of the appellant, and they are not before us for review on this appeal.

A contract by a common carrier of passengers, to carry a passenger from one place over his line or route to another, obliges the carrier not only to carry the passenger but a reasonable amount of personal baggage, although nothing is received or paid for this carriage of the baggage in addition to that paid for the carriage of the passenger. (Angell on Carriers, § 107, 108, 109; *Hawkins v. Hoffman*, 6 Hill, 586; *Powel v. Myers*, 26 Wend. 591; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Camden & Amboy R. R. Co. v. Burke*, 13 id. 611; *Hollister v. Nowlen*, 19 id. 239; *Cole v. Goodwin*, id. 251.)

The liability of the carrier for the baggage of a passenger is the same as for freight. He is liable as insurer for both. (Parsons' Mercantile Law, 226, 227; 2 Kent's Com. 602; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, id. 251.)

A carrier may, by notice, limit his liability for goods sent by him to an amount to be named by him, unless the contents of a box, bale, or parcel, if they exceed such sum, be disclosed to him to the end that he may demand such additional sum for his risk as may be agreed upon.

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(Angell on Carriers, § 232 to 236; *Clay v. William*, 1 H. Black, 289.)

In the absence of an express agreement or notice limiting liability, a carrier of freight is liable for property delivered to him for carriage without regard to the kind or value. In 2 Kent's Com. 603, it is said: The common carrier is answerable for the loss of a box or parcel of goods though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance. But the rule is subject to a reasonable qualification; and, if the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, or deludes him, by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods.

Had the trunk in question been delivered to the defendants to be carried as freight, they would have been most clearly liable for its contents. There was no notice limiting their liability, or requiring passengers to disclose the contents of their trunks. On the evidence there is no ground whatever for imputing to Strachwitz fraud or concealment. The defendants' agent, Rickerts, inquired of S. whether the trunk was valuable, and he was told that it was. This was all S. was called on to say, unless further inquiries were put to him, and enough was said to inform the defendants that if parcels were to receive attention in proportion to their value, the trunk in question needed such care, or if the defendants were entitled to demand an additional price for the increased risk, that the trunk was one which justified such charge. But neither Rickerts, nor any officer of the ship made any further demand as to the contents of the trunk or their value, nor was any further sum for its carriage demanded. S. it seems to me said and did all that could be reasonably required of him to protect the defendants.

The trunk is to be treated as the baggage of Strachwitz, and not merely as freight. And being baggage the defend-

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ants become liable only for such as a traveler usually carries with him for his personal convenience. This embraces such articles as it is usual for persons to carry with them whether from necessity or for convenience or amusement. Tools used by the passenger in his trade; (*Davis v. Cayuga & Susquehanna R. R. Co.*, 10 How. Pr. 330;) gems; (*Same and Van Horn v. Kermit*, 4 E. D. Smith, 453;) a watch and such jewelry as is usually worn about the person; (*McCormick v. Hudson River R. R. Co.*, 4 E. D. Smith, 181;) money for traveling expenses. (*Duffy v. Thompson*, 4 E. D. Smith, 178; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Grant v. Newton*, 1 E. D. Smith, 95; Angell on Carriers, § 115; *Jordon v. Fall River R. R. Co.*, 5 Cush. 69; Parsons' Mercantile Law, 225; *Weed v. Saratoga R. R. Co.*, 19 Wend. 534.)

The case last cited is the only one in the supreme court that can be said to hold the carrier liable for money contained in the trunk of a passenger. In *Orange Co. Bank v. Brown*, 9 Wend. 85, it was said by Justice NELSON that money is not a part of a passenger's baggage, beyond such sum as is reasonably necessary for his expenses. Even this doctrine was repudiated by BRONSON, J., in *Hawkins v. Hoffman*, 6 Hill, 586.

The common pleas of New York, in *Duffy v. Thompson* and *Grant v. Newton*, cited *supra*, has held, in conformity with the dicta in the 9 Wend. 85 and the 19 Wend. 534, that money for necessary expenses may be recovered for as part of a passenger's baggage.

In Massachusetts, Ohio, Pennsylvania, Illinois and several other states, the liability of the carrier is well settled, and has been for several years.

The question is distinctly presented by this appeal, and if it has not yet been decided in this state, it is our duty now to finally dispose of it.

Baggage is defined by Webster to mean "the clothing and other conveniences which a traveler carries with him on a journey." It is, of course, impossible to enumerate the

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articles that constitute what is called, in the definition, clothing; and it is still more difficult to specify what shall pass under the name of "*other conveniences*." The poor man and the rich carry baggage, and each pay the same fare to the carrier; but the baggage of the two men differ materially in the number and quality as well as in value. While the risk incurred by the company for the loss of the baggage of the one may be \$100, in the other it may be five times that sum. To attempt to limit the amount of baggage for which a company shall be liable would be productive of great annoyance to the largest class of persons who travel in our stages, and on our steamboats and railway cars. The sum must necessarily be a mean between two extremes in value; and while it may be, and doubtless would be, more than sufficient to cover the baggage of one class of passengers, it would fall much below the value of that of another class. If those whose comfort requires the conveyance of a large amount of baggage cannot have it transported without the annoyance of reporting its value and paying to each carrier an additional sum for the excess over the amount to which a passenger is limited, other and competing modes of carriage would be created, and in the end the carrier would suffer more than he would gain by the attempt to lessen his risk by annoying or taxing the traveler.

Carriers and courts have, as I think, wisely left this question an open one; and the result is, I apprehend, less loss to the carrier than he would incur by limiting his liability and annoyance to the passenger.

The value of the baggage which a carrier obligates himself to carry being unlimited, the only other limitations are whether it is necessary for the passenger on the journey, in the course of which the carrier is employed.

This necessity depends on the pecuniary circumstances and the tastes and habits of the passenger, and it varies with the state of society in which he lives. What is necessary to a man of wealth and of refined tastes and habits,

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may be wholly useless to a person of different tastes and habits; or, if he has the taste, they may be beyond his means. Necessity, then, as applied to this subject, is a relative term, and must determine in view of all the facts and circumstances of the case.

Again: the baggage must be such as is necessary for the particular journey that the passenger is, at the time of the employment of the carrier, actually making. It would be a most unreasonable extension of the rule to hold that a person going to a distant country to reside may fill his trunk with sufficient clothing to last him a couple of years, and hold the railroad or steamboat company liable for the value, as baggage for the journey. It would be equally severe to limit the quantity of clothing a young lady going to a watering place may carry as baggage, to that necessary to enable her to wear to and at her place of destination. She requires, according to her views of necessity and in conformity with the habits and tastes of the society in which she moves, as much as would be required by another and less fashionable person for use for a year.

The question is, in each case, for a jury, under proper instructions from the court.

That which will constitute baggage is, as already suggested, impossible to enumerate. The articles which will pass under the denomination of "other conveniences" are as various as the tastes, occupations and habits of travelers. The sportsman who sets out on an excursion for amusement in his department of pleasure needs, in addition to his clothing, his gun and fishing apparatus; the musician his favorite instrument; the man of letters his books; the mechanic his tools. In all these cases, and in a vast number of others unnecessary to enumerate, the articles carried are necessary in one sense to the use of the passenger. He cannot attain the object he is in pursuit of without them, and the object of his journey would be lost unless he was permitted to carry them with him. Yet, under pretense of carrying these articles, it by no means follows that the car-

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rier is bound to carry a box of guns, a pianoforte, or organ, a library, or the tools and machinery of a machine shop. I believe there is no difference of opinion in regard to the liability of a carrier for the loss of such articles as are above enumerated, forming part of the baggage of a passenger.

A watch and such articles of jewelry as are commonly worn upon the person, are not as essential to the passenger as clothing or the articles above mentioned. But they are things usually carried on the person, and to some extent as necessary as the other. A watch is indispensable to a traveler. Why may they not be carried in a trunk with the rest of the passenger's baggage? I think experience has shown that such property is safer in a trunk than on the person while traveling. To hold that they may not be carried in a trunk, without notice to the carrier and paying extra compensation therefor, is to subject the passenger to unnecessary annoyance and to add but very little, practically, to the burthen of the carrier.

These considerations apply, in all their force, to money carried in a trunk or other package as a part of the traveler's baggage. It must be carried in some way—it is indispensable. Why may it not be carried in a trunk? Limited as it must be in amount to a sum sufficient to defray the expenses of the journey, why is it any less a part of the baggage than jewelry? If the one may be carried in a trunk at the risk of the carrier because it is safer when so carried, or because it may be considered as in some degree necessary, why may not the other? It is vastly more necessary, and its safety much more important.

To compel a traveler to carry his money on his person, (and he will be compelled to do so if the carrier is not liable for it as part of his baggage,) is to increase the danger he incurs of violence to his person, and to convert our public conveyances into convenient places for the pick-pocket and the robber to carry on their callings.

If money may be carried as part of the baggage of a passenger, the next question is, how much may be so carried?

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The cases in which it has been held that money may be thus carried all concur in limiting the amount to such sum as is reasonably necessary to defray the expenses of the journey. (Parsons' Merc. Law, 225; Angell on Carriers, § 115; *Weed v. Saratoga Railroad Company*, 19 Wend. 534; *Orange County Bank v. Brown*, 9 Wend. 85; *Judson v. Fall River Railroad Co.*, 5 Cush. 69.)

The amount of money which may be thus carried will depend on the length of the journey, and, to some extent, on the wealth of the traveler. It is quite obvious that a man going from New York to China would require more money than if he were going to England only, and that a much larger sum would be required to defray the expenses of a millionaire than a poor Irish or German emigrant. In regard to amount, the jury must be guided by considerations similar to those which would govern them in determining what would be necessary clothing in a given case.

In the case before us. Strachwitz testifies that he intended when he left Germany to go to California, and procured the \$800 in gold to defray his expenses. Of this sum he paid but \$36 for his passage from Hamburg to New York. He purchased a ticket for the steerage, with the lowest and poorest of his fellow passengers. At the same time he represents himself as of noble birth—an officer in the Prussian service, fleeing from his country because he had fought a duel with his superior officer—and without knowing whether his antagonist was living or dead, nor does it seem that he has even yet learned his fate. This story cast suspicion over his whole evidence, but it was for the referee alone to say how far such a strange tale should bear on his evidence. He has credited him. He therefore finds that the money was obtained in order to defray his expenses to California, and I am not able to say that the amount was unreasonable.

I will now proceed very briefly to consider the objections that have been urged against holding that a carrier is liable

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for money carried in a passenger's trunk for the sole purpose of defraying his expenses. It is asserted

1. That the carrier receiving pay for the carriage of the passenger only, does not receive compensation in proportion to the risk he runs, and of the extent of which he has neither knowledge nor means of knowledge. If he is liable that liability may be to the extent of thousands of dollars, while the compensation actually received may be but a few cents.

I admit the hardship of the rule, where a loss for a large amount is incurred. But, while the hardship should be fully appreciated, it cannot control the question of liability. When an express company receives a box of jewelry or of specie, to be carried a few miles, the risk is enormous, but it does not influence very much the price charged. Yet the carrier is an insurer, liable for losses occasioned otherwise than by the act of God or the public enemy. The carrier establishes his charge for the transportation of passengers and freight with knowledge of the general principles of law which regulate the business in which he is engaged; and, although he cannot know the full extent to which these principles may be carried, he must, nevertheless, take upon himself the risk. He has a further protection, and that is, in certain cases, to limit his liability for property carried, unless the value is disclosed to him and an increased price paid, if demanded, on its carriage. If he will not thus protect himself when he may, I can perceive no reason why courts should limit or change a wholesome and necessary rule of law in order to protect him.

When he contracts to carry a passenger, he knows that, by virtue of that contract, he is bound to carry his baggage without additional compensation therefor, and that he is liable for its value if lost. If he will not require the passenger to disclose its value, he should not complain if the risk assumed is greater than the fare paid compensates. There is in law a sufficient consideration for the agreement to carry, and that is all that is required by the law.

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2. It is further objected that money is no part of the baggage that a traveler usually has with him, and it ought not to be so considered. This is begging the question. In practice money is carried by travelers in trunks, and the reason why the carrier should be held liable for it, as part of the baggage, I have already given.

3. It is said to be unjust to a carrier, who carries a passenger a few miles only, to subject him to liability for money deposited in his trunk to defray the expenses of a protracted and expensive journey, while his compensation for his carriage is a mere trifle.

The injustice is not chargeable to the law, but to himself. If he contracts to carry the passenger and his baggage without inquiring as to its value, and thereby inform himself whether an additional compensation should be demanded, he should be held to the strict and literal performance of his contract as made.

4. It is said that the courts of this state have never held and should not now hold a carrier liable for money as part of a traveler's baggage, whatever may be the rule in other states.

I cannot assent to this proposition. The very fact that such is the law in our sister states, is a very strong reason for its adoption in this state, if it is not already a part of our law. It would be unreasonable that carriers in other states should be liable for money as part of the baggage of a citizen of this state and we refuse the citizens of such states the same protection in this. It is one of those regulations of trade and business that the public good demands should be uniform; and it would be ungracious and unneighborly to refuse to conform to the rule because our courts have not heretofore adopted it.

I do not find that any specific objections were taken before the referee to the allowance of the value of any item of clothing or other article in the trunk, except the money. In the absence of any such exception, we are not called to

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say whether the allowance of the referee was or was not erroneous.

With the questions of fact we have nothing to do. While the rule entered by the general term declares the reversal to be for errors of fact and law, I conclude the errors of fact alluded to relates to the \$800. The opinions of the learned judges suggest no other. And thus construing the rule, I think the finding was not exclusively of fact but one of fact and law, which the general term erred in reversing. If it could be held that the judgment was reversed upon the facts, there is undoubtedly sufficient evidence to justify the reversal. But as I do not think that such was the intention of the court below, I am of opinion the judgment should be reversed and a new trial ordered; costs to abide event.

All the judges being for reversal, except HOGENDOORN, J., who did not vote, and DAVIES, J., who did not dissent, judgment reversed.

Statement of case.

JOHN A. McKOWN v. WILSON HUNTER.

Whatever the plaintiff may prove, in an action for malicious prosecution, the defendant is at liberty to disprove.

The essential elements of the action are malice and want of probable cause.

These it belongs to the plaintiff affirmatively to prove, or to introduce evidence in regard to them from which they may be legitimately inferred.

The defendant is at liberty to show both the absence of malice and the existence of probable cause; and no evidence pertinent to either issue should be excluded.

Hence, where the defendant in such an action is examined as a witness, on the trial, he may be allowed to testify that at the time he made a complaint against the plaintiff, for perjury, he believed the evidence given by the plaintiff, on a former trial, was material; and that he, at the time of making such complaint, believed that the plaintiff was guilty of the charge made against him.

THE action was for malicious prosecution, in making a complaint against the plaintiff, before an Albany police justice, on a charge of perjury. The cause, in which the plaintiff was alleged to have testified falsely, was tried at the Albany circuit, on the 23d of January, 1857. The action was on a bond of Joseph Hunter, the defendant's son, for the support of his wife according to his means. The defendant was a surety in the bond, and on his undertaking to protect him, William Wilcox also became a surety. Two actions were brought on the bond, one against each of the sureties. The suit against Wilcox was tried, and the plaintiff was sworn on that trial. One defense was that by agreement the money was to be paid, from time to time, on being called for by the plaintiff, in behalf of Mrs. Hunter, at the place of business of the defendant Wilcox, and that it was called for but twice, and in each instance paid. On two successive Saturdays the plaintiff called, and in each instance he got the money. He swore on the trial, for the purpose of putting the surety Wilcox in default, that on the ensuing Saturday night he again called for money at his place of business; that Wilcox told

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him he had none for him; that he remained there three-quarters of an hour, and that during all that time Wilcox stood at one end of his stall and Schwartz at the other. The defendant had handed three dollars to Wilcox that day to pay the plaintiff, and Wilcox had it ready to pay him if he called. On the testimony of the plaintiff judgment was obtained against Wilcox, on the bond. The defendant was informed by Wilcox that the plaintiff had sworn false to defeat him, and that he intended to make complaint against him. The defendant told Wilcox—who had become surety on his engagement to save him harmless—that as he was the party injured, he ought to make the complaint. The defendant heard McKown testify. He was informed, not only by Wilcox but by Schwartz, that what McKown had sworn to was false. He consulted Mr. Shafer and Mr. Hungerford, who were his counsel, and also counsel for Mr. Wilcox on the trial, and they both advised him that the testimony of McKown had controlled the judgment, and that, in their opinion, it amounted to perjury. The defendant and Wilcox appeared before Justice PARSONS, and stated the facts; and he told them that if those facts were proved, it was perjury, and advised them to make the complaint before Justice COLE, his associate. The defendant made his complaint in writing, and Wilcox and Schwartz were both examined by the justice, before the warrant was issued. The officer did not arrest the plaintiff, who was an attorney, but he was voluntarily examined. He called Mr. Courtney as a witness, who testified to his *opinion* that the testimony of McKown in the bond suit was immaterial. Justice COLE, at the close of the examination, stated “that McKown had undoubtedly sworn to a lie, but he did not think it material to the issue; but he would forward the papers to the grand jury.” Mr. Courtney, being district attorney, subpoenaed McKown to appear before the grand jury, but no bill was found.

The present action was founded solely on the proceeding before the *police magistrate*, and the complaint alleged that

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the prosecution was terminated by the plaintiff's acquittal and discharge by the magistrate.

The plaintiff, for the purpose of showing malice and bad faith in *making the accusation* before the magistrate, proved the subsequent declarations of Mr. Courtney and Justice COLE, that the false testimony was immaterial. He proved by one La Grange that the defendant, before the suit on the bond, had charged the plaintiff with swearing false on another occasion, and had declared his intention to prosecute him. He also proved that the defendant, in the interim between the trial of the bond suit and the complaint, imputed to him the perjury charged before the magistrate, and stated that he could prove it, and it would send him to the state's prison. The court excluded the testimony of the defendant, offered in reply, that he believed the testimony of the plaintiff to be material; and also excluded proof that, when he made the charge, he believed the plaintiff to be guilty of the offense charged. This evidence the court held to be incompetent and immaterial.

The jury found a verdict for the plaintiff for \$100, on which judgment was entered; and, on appeal, the same was affirmed at the general term. From the latter judgment the defendant appeals to this court.

John K. Porter, for defendant (appellant).

John H. Reynolds, for plaintiff (respondent).

HOGEBROOM, J. This is an action for malicious prosecution, and its essential elements are the want of probable cause and malice. (*Vanduzor v. Linderman*, 10 Johns. 106.) These it belongs to the plaintiff affirmatively to prove, or to introduce evidence in regard to them from which they may be legitimately inferred. (*McCormick v. Sisson*, 7 Cow. 715; *Murray v. Long*, 1 Wend. 140; *Bulkeley v. Smith*, 2 Duer, 261; *Van Latham v. Rowan*, 17 Abb.

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Pr. Rep. 238, 248.) Whatever the plaintiff may prove, the defendant is at liberty to disprove. He is, therefore, at liberty to show both the absence of malice and the existence of probable cause, and no evidence pertinent to either issue should be excluded. The defendant was sworn on the trial, and was asked whether he believed the evidence given by the plaintiff (on which the defendant attempted a prosecution against him for perjury) was material, and whether he, the defendant, believed, at the time he made the complaint against the plaintiff for perjury, that the defendant was guilty of the charge made against him? Both of these questions were overruled, and, I think, erroneously. They tended directly to repel the imputation of malice, and perhaps, to some extent, the want of probable cause. If answered in the affirmative, and reliance was placed upon the testimony by the jury, they would tend very much to exculpate the defendant; or, at all events, to mitigate the damages. How much weight the jury would give to such testimony, coming from the mouth of the defendant himself, was a question exclusively for them. The testimony, I think, was competent, within the cases of *Seymour v. Williams* (4 Kernan, 567); *Griffin v. Marquardt* (21 N. Y. Rep. 121), and *Forbes v. Waller* (25 N. Y. Rep. 430, 439).

In the first of these cases it was held that on an issue of fact whether an assignment of property was made to defraud creditors, it was competent to inquire of the assignor, who was a witness, whether, in making the assignment, he intended to defraud creditors, and thus to repel the imputation of actual fraud.

In *Griffin v. Marquardt*, testimony of the assignor that he made the assignment for the purpose of gaining time to pay his creditors and protect his indorsers, was held admissible for the purpose of establishing a fraudulent intent.

In *Forbes v. Waller* it was held proper to prove by the assignor his object and intent in making the assignment, and to prove by him that it was to prevent a sacrifice of his property. These cases go very far to establish the

general principle that where the motive of a witness in performing a particular act or making a particular declaration becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness.

It is suggested that as the jury had before them the affidavit of the defendant when he made his complaint against the plaintiff for perjury, the defendant had thereby the benefit of all the evidence to establish probable cause and the absence of malice, which he could supply by his own oral testimony before the jury. But this is not so. For in the first place those conclusions could only be inferentially drawn from that affidavit, and in the next, place, the defendant had the right, when he was on the stand, to have the benefit of all the inferences which could be legitimately made in his favor before the jury from testifying to these facts in a direct and positive manner before them, aided by such impressions as would be made upon the jury by his appearance, manner, and mode of testifying.

As we are clearly of opinion that a material error to the prejudice of the defendant was committed on the trial, by the exclusion of this evidence, it is unnecessary to examine any of the other questions made in the case.

The judgment must be reversed and a new trial granted, with costs to abide the event.

DAVIES, J., read an opinion for affirmance. All the other judges being for reversal, judgment reversed.

Statement of case.

TRAVERSE H. READ and others v. MORRELL B. SPAULDING.

When a carrier is entrusted with goods for transportation, and they are injured or lost on the transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or the public enemy. And to avail himself of such exemption, he must show that he was himself free from fault at the time.

His act or neglect must not concur and contribute to the injury. If he departs from the line of his duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected.

Thus, where there was an unreasonable delay on the part of a carrier, in forwarding goods, and while they were in a railroad depot, at an intermediate point, they were wetted and injured by an extraordinary flood, caused by the damming up of the water in the channel by ice and setting the same back upon the freight depot; Held, that the goods having been exposed to the peril by the fault and neglect of the carrier, he was not excused.

Appeal from a judgment of the Superior Court of the city of New York.

THE action was brought against the defendant as proprietor of, or person doing business, under the name and style of "Spaulding's Express Freight Line," to recover for the injury and damages done to five cases of goods which he agreed to transport or forward from the city of New York to Louisville, in the state of Kentucky. They formed part of eighty-four cases of straw goods which were delivered to the defendant in the city of New York on the 27th day of January, 1857. The answer alleged that the defendant was a forwarder only, and not a common carrier; it denied any negligence or unreasonable delay, and averred that whatever injury the goods sustained was caused by an extraordinary flood; and that all that human foresight and skill could do was done to avoid damage and guard against said flood. The average time occupied in the carriage of goods from New York to Louisville was about fifteen days, and it appeared that seventy-nine of the cases so received

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arrived at Louisville in twelve or fourteen days from the time of their delivery to the defendant in New York. It also appeared that the five damaged cases reached Albany on Saturday, the 7th of February, 1857, and were stored in a warehouse of the N. Y. Central Railroad Company, and were damaged on the night of the 8th and morning of the 9th, by water, occasioned by an unprecedented flood in the Hudson River, to the amount of \$681.83. It was admitted that Albany by the route of the Harlem Railroad was 160 miles from New York, and freight cars were running on that road from New York to Albany daily. The defendant moved for a non-suit, on the trial, on the ground (among others) that the damage to the goods was caused by the act of God, and that the defendant was not therefore liable. The judge refused to non-suit, and directed a verdict for the plaintiffs for \$681.83, the full amount of the damage done to the goods, including interest. The defendant excepted to the rulings of the judge, and the exceptions were directed to be heard, in the first instance, at the general term. Judgment was ordered in favor of the plaintiffs, by the general term, upon the verdict, with costs, upon the ground of "unreasonable and unexcused delay in the transportation, and actual injury resulting therefrom." (See 5 Bosw. 395 S. C.) The defendant thereupon appealed to this court.

S. T. Fairchild, for the appellant.

I. If the delay between New York and Albany was inexcusable, the defendant would be liable for such damages as are naturally and directly attributable to the delay, and for no other—as interest on value—additional premium on insurance, if paid—and, it may be, deterioration in value or price, caused by delay. (Angell on Carriers, p. 490; *Black v. Baxendale*, 1 W. H. & G. 410.)

II. If the delay was "unavoidable," the defendant would not be liable for any damages caused by the delay.

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because, by the express terms of the contract, the plaintiffs "assumed the risk of damage from unavoidable delays."

III. It would have been useless and irrelevant for the defendant to give evidence of the facts which would have shown the delay to have been unavoidable, because the damages for which the action was brought and for which the verdict and judgment have been rendered were not caused by the delay, but by the flood. Judge WOODRUFF, in giving his opinion in the case, admits that the flood caused the actual injury, and that the delay did not cause the flood, but because no excuse was shown for the delay, he holds that the defendant, therefore, forever afterwards lost all protection from liability for damages, though caused by the act of God. He admits that the only case which he cites bearing upon the question, (*Morrison v. Davis*, 20 Penn. Rep. 171,) is against the doctrine which he lays down, and he cites, to sustain his doctrine, seven cases which have no relevancy to the question, viz: 6 Bing. 716; 12 Conn. 410; 4 Whart. 204; 3 Sand. 610; 1 Conn. 492; Harp. S. C. 262, 468. The first four of these seven cases were cases where the damages occurred at a time when the carrier had deviated from the voyage on which he had agreed to carry, and for which the owner of the property had effected insurance. Deviation is not only a voluntary act but it involves a change of risk and peril in the voyage which is manifest before it is entered upon. Not so with delay. The carrier, by an unnecessary deviation, assumes the risk not only of any damages that may happen consequent upon, but also of all subsequent to deviation, so long as it continues. The law making a carrier responsible for loss arising subsequent to deviation seems to be founded upon good policy, for by the law of insurance an insurer is released from liability by such deviation, and if the carrier be not held, the owner has no way to protect himself against his loss but by taking out another insurance against deviation, and thus incurring

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additional expense for which he can have no recovery. Aside from the question of insurance, the owner might not be willing to subject his goods to the peril of a voyage different from the one he intended them to take, and it might well be that he would select a different vessel for such a voyage, as the court suggested in 6 Wheat. 204. There would seem to be reasons ample for setting aside the maxim *Causa proxima non remota spectatur*, in the case of deviation—or rather the maxim does not apply, for it is a question whether the carrier has put himself in the position of the owner as to any accident, and the law holds that he has, having voluntarily assumed some of the functions of the owner over the goods, against the consequences of which the owner has no protection if he cannot look to the carrier.

The other three cases were cases where the damages were caused by negligence, want of ordinary care in the carriers, and they were held liable for that reason. Such cases do not apply in this case, as it was admitted that "there was no negligence or omission of duty on the part of the defendant in not anticipating the occurrence of the flood; and from the time it was apparent there would be a rise of water the goods could not have been prevented from being wet as they were." No more do the cases based upon deviation apply to this case, for the law of deviation rests upon reasons peculiar to itself—and unless there be some positive law by which the carrier is held liable for all loss subsequent to delay, or some public policy, by which he ought to be held for such loss, then he is released from liability for all damage, except such as is the natural consequence of his delay, namely interest on the value of the goods—perhaps deterioration in price, and if the owner be insured, the additional premium he must pay.

IV. The proximate cause of the damage in this case was the unprecedented flood, and the defendant is therefore exempt from liability under the maxim, *In jure non remota*

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causa, sed proxima spectatur. It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree. The policy of the law makes the common carrier responsible for everything but acts of God and the public enemies. "For else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet in doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." (Lord Holt, 2 Raym., 909.) Story (on Bailments, § 490,) says: "He is treated as an insurer as to all but the excepted perils, upon that distrust which an ancient writer has called the sinew of wisdom." In § 491 he quotes, Ch. J. BEST, "to give due security to property the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely the act of God and the King's enemies." In § 492, he says, "In questions therefore as to the liability of a carrier the point ordinarily is not so much whether he has been guilty of negligence or not as whether the loss comes within either of the excepted cases." He says also, that a carrier may by his negligence be liable for even such a loss, as if a bargeman should rashly shoot a bridge in tempestuous weather. Against the excepted perils the carrier must use ordinary care. STORY, J., in *Waters v. Louisville Insurance Co.* (11 Pet. 223), says: "It is a well-established principle of the common law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause. *Causa proxima non remota spectatur*, and this has become a maxim

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not only to govern other cases but to govern cases arising under policies of insurance." How can it be said with any propriety that the defendant was negligent in not avoiding the flood, or that he colluded with the Harlem Railroad Company for delay in transporting the goods so that they should reach Albany just in time for the flood? The only cases directly in point, that I can find, are *Morrison v. Davis* (20 Penn. 171); *Denny v. N. Y. Central R. R. Co.* (13 Gray, 481.) In both these cases this doctrine is maintained. "But the ordinary consequence of the fault-charged in this case is the loss of time, and the penalty is measured accordingly, even though a concurrence of other extraordinary circumstances has greatly increased the extent of the loss. The law does not make the delay an element in testing the inevitableness of the final disaster." (20 Penn. 171.) In this case the plaintiffs could have protected themselves against loss by continuing their insurance, and have had proper remedy against the carrier for the additional expense. No one can say it might well be the plaintiffs would have chosen a different means of conveyance for their goods after the delay of ten or eleven days, when every thing connected with the means of transportation was in the same apparent condition as when the goods were delivered to the defendant. Neither ordinary nor extraordinary care could have foreseen such a flood as occurred when "the water rose suddenly some four feet higher than it had ever risen before." The judge, in 4 Whart. 204, said there was one of two proper courses for the master to pursue: "To remain in safety at the mouth of the canal, or in some convenient and safe place in the neighborhood, until the obstructions were removed; or he should have returned and informed the owners and shippers of the impracticability of proceeding through the canal." But if delay devolves upon the carrier the same responsibility as deviation, then in that case there was but one proper course for the master: to return to the owners for instructions. If the owner, after every such loss, were allowed to seek

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whether the carrier had been guilty of neglect or delay in any previous part of the journey, "it would induce an infinite number of questions as to the quantum of care which, if used, might have prevented the loss." (5 B. & Ald. 174.) The following authorities show what is meant by act of God: Story on Bailments, § 511; Angell on Carriers, § 154; *Coggs v. Bernard* (1 Raym. 909); *Forward v. Pittard* (1 T. R. 33).

Causa proxima is illustrated by the following authorities: Story on Bailments, § 515; *Rusk v. Royal Ex. Ass. Co.* (2 B. & Ald. 72); *Green v. Elmslee* (Peake's N. P. C. 212); *Livrie v. Jansen* (12 East, 647); *Walker v. Maitland* (5 B. & Ald. 174); *Patapsco Ins. Co.* (3 Peters, 222); *Columbia Ins. Co.* (10 Peters, 507); *Waters v. Merchants' Ins. Co.* (11 Peters); *Rice v. Homer* (12 Mass. 230); *Williams v. Suffolk Ins. Co.* (3 Sumner, 270); *Saddler v. Dixon* (8 M. & W. 895); *Redman v. Wilson* (14 M. & W. 476); *Marble v. Worcester* (4 Gray, 395).

No law commands, no public policy requires, that the common carrier, a necessary and invaluable public servant, should be held liable for a loss occurring under the circumstances which caused the damage for which the judgment in this case was rendered.

G. M. Speir, for the respondents.

I. The defendant was a common carrier and liable as such under the bill of lading or contract, and not a mere forwarder, whose duty consisted only in receiving and delivering the goods to others to be carried. (*Blossom v. Griffin*, 3 Kern. 569; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith 115; *Fairchild v. Slocum*, 19 Wen. 329; *Wilcox v. Parmelee*, 3 Sand. S. C. R. 610.

1. The term to be forwarded by Spaulding's Express to the place named in the bill of lading, to wit: "to R. A. & Co., Louisville, Ky., via Indianapolis," is controlled by the nature and extent of the undertaking. The defendant

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was bound to deliver the goods at Louisville whether the term used was "carry" or "forward." Besides, the compensation received of \$1.78 per 100 lbs., was the price for the whole service. (*Muschamp v. Lancaster Rail R. Co.*, 8 Mees. & Wels., 421.)

2. The fact proved, "that the defendant had no interest in or control over any of the routes or railroads mentioned in the said bill of lading over which the said goods were transported," does not relieve him from his responsibility. He undertook to deliver the goods, and it thereby became his duty to provide the means.

3. The bill of lading does not specify any routes or railroads. It simply states that the goods should be carried via Indianapolis.

4. The provision that, in case of loss from any cause from which Spaulding's Express should be liable, they shall have the benefit of any insurance thereon, and in case of loss on the lakes, the freight and charges to or at Buffalo should be paid by the owner is wholly inconsistent with the claim that his duty was performed, and his liability terminated by a mere delivery of the goods to other persons to be carried.

II. The injury to the goods resulted from the unreasonable and inexcusable delay in their transportation, through the negligence and fault of the defendant.

1. The defendant received all the goods at the same time, to wit, on the 27th of January, 1857, in New York, and all the cases, excepting five, which were damaged, reached their place of destination in twelve or fourteen days after they were received in New York, that is to say, they reached Louisville on the 8th or 10th of February.

2. The five damaged cases reached Albany on the 7th of February, when they ought to have been with the undamaged goods at Louisville. The proof is that the average usual time of conveyance from New York to Louisville is from ten to fifteen days, and there is nothing in the case to show that the undamaged goods were carried

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through by any unusual speed. It is plain, therefore, that if the defendant had performed his duty these five cases would have reached Louisville at the same time with the others.

3. The distance between Albany and New York by the Harlem Railroad is 160 miles, and freight cars were running on that road daily; and there is no explanation offered by the defendant for this gross negligence in the performance of his duty.

III. The defendant, as common carrier, must be without fault himself, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God. He omitted to perform his plain duty, and violated his contract to carry, by an unreasonable detention. The delay did not cause the flood, but did expose the goods to the peril. From the moment his faulty negligence began, he became an insurer against the consequences therefrom, both ordinary and extraordinary. (*Davis v. Garrett*, 6 Bing. 716; *Bell v. Reed*, 4 Binney, 127; *Hart v. Allen*, 2 Watts, 114; *Williams v. Grant*, 1 Conn. R. 492; *Crosby v. Fitch*, 12 Conn. R. 410.)

IV. The clause in the contract that "no risk should be taken over two hundred dollars on any single package," has reference to perils which occur without the actual fault of the defendant, and does not exempt him from liability from losses resulting from his actual negligence. (*Cole v. Goodwin*, 19 Wend. 251; *Gould v. Hill*, 2 Hill, 623; *Hollister v. Nowlen*, 19 Wend. 234.)

1. The intention of inserting the clause was to guard against liability upon small packages of goods of great value, and to diminish the risk of insurance without a corresponding compensation for transportation.

2. The seventeen packages were enclosed in a rough open box, through which they could be seen. The defendant received one dollar and seventy-eight cents for every one hundred pounds. He received pay, therefore, for

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seventeen packages instead of one, and the defendant knew he was receiving seventeen packages.

DAVIES, J. It is conceded that there was unreasonable delay on the part of the defendant in the carriage of the goods from the city of New York to the city of Albany. The eighty-four cases were delivered together on the 27th of January, and it was the duty of the defendant to transport or forward the same without unnecessary delay. If they had all been forwarded together, the whole would have reached Louisville about the time that those five cases reached the city of Albany. Then it is also conceded that the goods were injured by an act of God, which ordinarily would excuse the carrier. The law, upon well known motives of policy, has determined that a carrier shall be responsible for the loss or injury to property entrusted to him for transportation, though no actual negligence exist, unless it, the loss or injury, happen in consequence of the act of God, or the public enemy. (*Wibert v. The New York & Erie Railroad Company*, 2 Kernan, 245.) The defendant seeks to avail himself of this well recognized rule of law to relieve himself from liability in the present action; and there would be no question that it would be adequate for such purpose if the defendant had been free from fault himself, and if his negligence had not contributed to the injury complained of. It is a well settled rule that, when the law creates a duty or charge, and the party is disabled from performing it, without any default in himself, and has no remedy over, the law will excuse him. (*Harmony v. Bingham*, 2 Kern. 99.) It is to be observed that the foundation of this exemption is, that the party claiming the benefit and application of it must be without fault on his part. If these goods, therefore, had been forwarded from New York to Albany with reasonable diligence, and the injury had happened to them, as it did, by an act of God, then the defendant would have been excused and exempted from liability for the damages to

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the goods so entrusted to him. This principle or distinction is fully recognized by abundant authority, and is founded alike upon sound sense and good morals. In *Davis v. Garrett* (6 Bing. 716), the plaintiff put on board the defendant's barge, lime, to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and, during the deviation, a tempest wetted the lime, and, the barge taking fire thereby, the whole was lost. The defendant claimed that, the lime having been destroyed by the act of God, he was exempt from all liability for its loss. But the court thought otherwise; and TINDAL, C. J., in delivering the opinion, observed that no wrong-doer can be allowed to apportion or qualify his own wrong; and that, as a loss had actually happened whilst his wrongful act was in operation and force, and which was attributable to his wrongful act, he could not set up, as an answer to the action, the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done. There is no evidence of this character in the present case, nor any suggestion that the injury in the present instance would have occurred if the goods had been sent forward without any unreasonable delay. It is apparent that if they had been they would not have been injured in the particular manner they were. If the five cases injured had gone on with the other seventy-nine cases, and no reason is suggested why they could not, it is reasonable to assume they would have reached their ultimate destination without injury.

In the case of *Buson v. The Charleston Steamboat Co.* (1 Harp. 262), where goods were laden on board a steamboat which grounded from the reflux of the tide, in consequence of which she fell over, and the bilge water rose into the cabin and injured a box of books belonging to the plaintiff, the defendants were held liable for the loss. The court

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regarded the defendants as guilty of negligence, in not selecting a proper place for the grounding of the vessel, and in not removing the books when the water came into the cabin, and said that the injury was not an unavoidable consequence of the grounding, but the consequence of negligence in grounding. So also, in *Campbell v. Muse*, (1 Harp. 468.) The wagon of the defendant, in which he was carrying goods for hire, stuck fast in fording a creek, and the water rising suddenly damaged the goods, it was held that the defendant was liable for the damages so occasioned. The court say, that it is manifest that if the defendant had gone through the creek, without stopping, no injury would have resulted; his halting there, and not the rise in the creek was the cause of injury, and if such circumstance were to operate as a relief from liability, the carriers of this description would be always exempted. In *Bell v. Reed*, (4 Binney, 127,) the supreme court of Penn. held that a carrier's vessel must be seaworthy, or he must answer for the loss or injury to goods carried in her, although the loss does not proceed from the unseaworthiness. *Hart v. Allen* (2 Watts, 114), contains a very critical review of the case in 4 Binney, and GIBSON, Ch. J., says, that it was held in that case, that to render a carrier liable for an act of Providence, it is necessary that his own carelessness should have co-operated with it to precipitate the event. And in this latter case, it was held that the first inquiry was, to test the liability of the carrier whether the captain and crew of the vessel carrying the goods had competent skill and ability to navigate the vessel; and if they had not, whether the want of it contributed in any degree to the actual disaster. In *Hand v. Boynes* (4 Whar. 204), the carrier was held liable for loss of goods, caused by an act of God, on the ground that he had deviated from the direct and usual route, and was therefore in fault at the time the injury happened.

In *Williams v. Grant*, (1 Conn. Rep. 487), SWIFT Ch. J. thus clearly defines the rule of law applicable to a case of

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this kind. He says: "Under the term *act of God* are comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent; and in cases of this description, carriers may be liable for a loss arising from an inevitable necessity existing at the time of the loss, if they had been guilty of a previous negligence or misconduct by which the loss may have been occasioned." GOULD, J., said: "It is a condition precedent to the exoneration of the carriers, that they should have been in no default, or in other words, that the goods of the bailee should not have been exposed to the peril or accident which occasioned the loss, by their own misconduct, neglect or ignorance. For though the immediate or proximate cause of a loss, in any given instance, may have been what is termed the *act of God*, or inevitable accident, yet if the carrier unnecessarily exposes the property to such accident, by any culpable act or omission of his own, he is not excused." *Crosby v. Fitch* (12 Conn. 410), holds the same doctrine. These cases therefore clearly establish the rule that the carrier cannot avail himself of the exception to his liability which the law has created, unless he has been free from negligence or fault himself. The policy of the law is to hold carriers to a strict liability; and this policy for wise and just purposes ought not to be departed from. But when the injury occurs from a cause which the carrier could not guard against nor protect himself from, in such an event the law excuses him, but it only does it when he himself is not in fault and is free from all negligence.

There are two cases which seem to maintain a contrary doctrine and which will now be adverted to. One is that of *Morrison v. Davis* (20 Penn. R. 171). In that case goods were carried in a canal boat on the Pennsylvania canal, and were injured by the wrecking of the boat caused by an extraordinary flood, and it was held that the carriers were not rendered liable merely by the fact that when the boat was started on its voyage one of the horses attached to it was lame, and that in consequence thereof such delay

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occurred as prevented the boat from passing the place where the accident happened, beyond which place it would have been safe, and the general proposition was decided that carriers are answerable for the ordinary and proximate consequences of their negligence, and not for those which are remote and extraordinary. The court in its opinion assumed that the immediate cause had the character of an inevitable accident, but that this cause could not have affected the boat had it not been for the remote fault of starting with a lame horse. And the general rule was declared to be that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of the faults with other circumstances that are of an extraordinary nature, and it was held that the true measure of liability was indicated by the maxim, *causa proxima, non remota spectatur*.

The other case is that of *Denny v. New York Central Railroad Company* (13 Gray, 481), where it was held that the proprietors of a railroad, who negligently delayed the transportation of goods delivered to them as common carriers, and then to transport them safely to their destination, are not responsible for injuries to the goods by a flood while in their depot at that place, although the goods would not have been exposed to such injury but for the delay. The jury found specially that the defendants were wanting in that degree of care and diligence which the law required of them in seasonably transporting the plaintiff's wool from the Suspension Bridge to Albany, and that the wool was injured by reason of the want of such care and diligence, and that the defendants were wanting in that degree of care which the law required of them in attempting to save the plaintiff's wool from the injury which it received at the place where it was deposited by them on its arrival at Albany. In the opinion of the court the case was considered only upon the first finding, the verdict of

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the jury upon the second having been set aside as against the weight of evidence. And the court held the jury only to affirm that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure, and the consequent detention of the wool at Syracuse, it was injured by the rise of the water in the Hudson, and thereby sustained damages to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendants' freight depot and carried forward to Boston before the occurrence of the flood. The decision was put in the case upon the ground that the defendants were responsible only for the proximate and not for the remote consequences of their actions. And the court, arriving at the conclusion that the defendants were not liable, placed much stress upon the fact that the duty of the defendants, as carriers, had terminated at the time the injury happened. They had made the delivery required of them, and they were sought to be charged because they had not made it earlier. At the time of the flood, therefore, they were not in charge of the wool as common carriers. All their duties and responsibilities as such had ceased, except that they were liable for such damages as the owners had sustained by reason of their delay in the delivery of it. The court say that the rise in the waters of the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, that is, the termination of their duty as carriers, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse, and could not, therefore, subject them to responsibility for an injury to the plaintiff's property resulting from a subsequent inevitable accident which was the proximate cause by which it was produced.

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In the case at bar, the property was yet in the custody, care and control of the carrier. His duty in relation to it had been only in part performed, and although the injury would not, doubtless, have happened but for the negligence of the defendant, yet it can hardly be said that such negligence was so remote that it did not contribute to the injury. A similar objection was urged in the case of *Davis v. Garrett* (*supra*), where it was urged that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself, for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But the court held the objection untenable, and said the same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance and a loss had thereby ensued, and yet the defendant in that case would undoubtedly be liable. These cases in Pennsylvania and Massachusetts would seem to establish the exemption of the defendant from liability in the present action. If they are to be regarded as holding that doctrine they are certainly in conflict with numerous adjudged cases, and would greatly relax the rules as to the responsibility of common carriers, and in this state, where with one exception, these rules have been rigidly adhered to, they ought not to be followed. When the carrier is entrusted with goods, and they are injured or lost on the transit, the law holds him responsible for the injury. He is only exempted, by showing that the injury was caused by an act of God or of the public enemy. And to avail himself, of such exemption, he must show that he was free from fault at the time. In the language of the superior court, "a common carrier, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God, must be without fault himself; his act or neglect must not concur and contribute to the injury. If he departs from the line of duty and vio-

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lates his contract, and while thus in fault, and in consequence of the fault, the goods are injured, by the act of God, which would not otherwise have caused the injury, he is not protected." For these reasons I am of the opinion, that the judgment of the superior court should be affirmed.

JOHNSON, J., was for reversal. All the other judges being for affirmance, judgment affirmed.

Abstract of case.

CHARLES W. BRIGGS and JOHN T. BRIGGS v. CHARLES SIZER.

Neither the retention of an order for the delivery of property by the drawee, nor the subsequent recognition of it in a letter, or in conversation, nor all of them combined, will prove an acceptance of the order.

Retention of an order may, unexplained, justify an inference of acceptance. But, where the drawee of an order for carrot seeds wrote a letter to the payees acknowledging the receipt of the order, and saying that he could not then fill the order, but that he would try and send a part or the whole of the seed in the course of two or three weeks; *Held*, that the inference arising from the retention of the order was rebutted by the letter.

Held, also, that the letter was not an acceptance of the order, there being no promise to deliver, at any time, any quantity of seed.

That the letter was to be treated rather as an offer of new conditions, upon which the drawee expressed his willingness to try to deliver all or part of the seed; and that, if it were thus considered, then it was incumbent on the payees to notify the drawee of their acceptance of the proposed terms.

A recognition, by the drawee, of the *goodness* of an order, is not an acceptance; especially where he declares, at the same time, his inability to deliver the property unless the payee will wait until he can import it.

Orders for the delivery of personal property do not require any acceptance.

They are usually ratified by a delivery of the property on presentation; and hence it is that possession of such an order, unexplained, is evidence that the drawee has paid it.

The holder of such an order may, however, require an acceptance of the same in writing; and, when he does require it, the drawee is bound so to accept.

Where the payees did not ask or expect a written acceptance of the order, but sent it forward in the expectation that the property would be at once forwarded or notice given that it would not be delivered, and the drawee declined to accept, and immediately notified the payees of his determination not to accept unless they would accept the conditions which he proposed, which they failed to do; *Held*, that, after this, the retention of the order by the drawee could have no effect on the relation of the parties.

It is not necessary there should be a consideration moving from the payee to the drawee of an order in order to support an acceptance. In this case, as in all cases of bills of exchange, the consideration for the acceptance moves between the drawer and drawee, and not between holder and acceptor.

If there is a valid contract between the drawer and drawee, by which each agrees to sell and deliver property to the other, the promise of the one party is a sufficient consideration for the promise of the other, and the drawer can maintain an action for the breach of the contract.

Statement of case.

THE plaintiffs are partners in the business of raising garden seeds at Rochester, in this state, and the defendant is engaged in the same business at New Lebanon, in Columbia county. J. Rapelje & Co. were partners, carrying on the same business at Rochester. In September, 1855, the defendant was at Rochester, and, while there, entered into an arrangement with Rapelje & Co. to exchange with them garden seeds raised by him for garden seeds raised by them, and each delivered to the other a schedule containing the kinds and quantities which each desired to receive. It would seem that prices were agreed upon for the various kinds of seed, but whether such prices were entered in the schedules does not distinctly appear. It would also seem that the defendant was accustomed to visit those who purchased seeds of him, before the time for delivery thereof, in order to ascertain the kinds and quantities desired, and that the arrangement with Rapelje & Co. was made while on such an excursion. At the time of making this arrangement some of the seeds were not threshed so as to be ready for delivery; when they were ready does not appear. Amongst other seeds desired by Rapelje & Co. of the defendant was 1,000 pounds of carrot seed, which was worth in October, 1855, fifty-six cents per pound.

Soon after the aforesaid arrangement was made, R. & Co. sold to the plaintiffs 500 lbs. of the carrot seed, to be delivered by the defendant, and gave to them an order on the defendant in the words following, viz:

"Charles Sizer—deliver to Briggs & Bro. 500 pounds
carrot seed and charge J. RAPELJE & Co.

"1st Oct., 1855."

This order was immediately enclosed to the defendant by mail, who received the same and has ever since retained it. On the 4th October, 1855, the defendant caused to be written to the plaintiff a letter, of which the following is a copy, viz:

"NEW LEBANON, Oct. 4, 1855.

"Esteemed Friends,—Yours of the 1st inst. containing

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Rapelje & Co.'s order for carrot seeds was duly received. I cannot get any carrot seeds of our folks as I generally have, and therefore cannot supply at present. My crop is pretty fair, but is not dry enough to thresh. I will try to send a part or the whole of it in two or three weeks.

"Yours respectfully, CHARLES SIZER,

"*Per J. A. Young.*"

Immediately on the receipt of this letter the plaintiffs paid R. & Co. for the five hundred pounds of seed by giving them notes therefor, and such notes were subsequently paid. R. & Co. failed in business in December, 1856, and assigned their property for the benefit of their creditors. They were solvent when the arrangement was made, in September, 1855. On the 19th of November, 1855, the plaintiffs wrote to the defendant urging him to send forward the carrot seed, as they would be short. In January, 1856, there was a personal interview between the defendant and the plaintiffs, wherein the defendant recognized the order, by stating that it was good, and offering to furnish the seed if the plaintiffs would wait till he could import it from France, which the plaintiffs declined to do on account of the lateness of the season. The defendant has never furnished any carrot seed on the order. Its value was \$332.

The complaint contained two causes of action, in the first of which the arrangement between R. & Co. and the defendant was set forth, and the drawing and acceptance of the draft were alleged, and the non-delivery. The second cause of action contained the same matters, and also a claim for special damage, by reason of the non-delivery of the seed. The answer was a general denial of the complaint.

The cause was tried before DAVIS,* J., without a jury, who found the facts above stated, and ordered judgment for the plaintiffs for \$332, besides costs.

The court further found, as matter of fact, that at the time the order was drawn on the defendant by R. & Co.

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they were indebted to the defendant for balance of account in the sum of \$60, but when the arrangement was made in September, the defendant was indebted to R. & Co. in the sum of about \$400.

The general term of the seventh district reversed the judgment, and ordered a new trial, upon the grounds: 1st. That there never had been an acceptance of the order, and 2d. That there was no consideration for the defendant's promise.

The plaintiffs appealed to this court, stipulating that final judgment might be entered against them if the judgment of the general term should be affirmed.

Daniel Wood, for the appellant.

J. Van Voorhis, for the respondent.

MULLIN, J. If there was an agreement entered into by the defendant to deliver 500 pounds or any other quantity of carrot seed, that agreement was with Rapelje & Co., and not with the plaintiffs, unless the defendant accepted the order drawn by R. & Co., in favor of the plaintiffs. It was the acceptance, and the acceptance alone, that gave the plaintiffs a right of action. The original agreement has never been transferred to the plaintiffs. The right of action for its breach passed to the assignee of R. & Co., by the assignment for the benefit of their creditors, or remains in them.

The important and indeed the only question in the case is did the defendant accept the order? The court below did not in terms find an acceptance, but it found facts from which it is said acceptance may be inferred. These were the retention of the order; the subsequent recognition of it, in the defendant's letter of the 4th of October, 1855, and in the conversation in January, 1856. But none of these, nor all of them combined, prove an acceptance.

Retention of an order may, unexplained, justify an infer-

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ence of acceptance, but in this case any such inference is rebutted by the letter of the 4th of October. In that letter the defendant distinctly informs the plaintiffs that he could not then fill the order but he would *try* and send some or all of it in the course of two or three weeks. If this letter is relied upon the plaintiffs must take the acceptance as given, and that acceptance was to try to deliver in two or three weeks a part or the whole of the carrot seed. This is no acceptance of the order. There is no promise to deliver at any time any quantity of seed.

This letter is to be treated rather as an offer of new conditions, upon which the defendant expresses his willingness to try to deliver all or part of the seed. But, if it is thus considered, then it was incumbent on the plaintiffs to notify the defendant of their acceptance of the proposed terms. This they never did, but insisted on the letter as an acceptance of the order, and claimed damages by reason of the non-delivery of the seed.

There was nothing in the interview of January, 1856, evincing an intention to accept the order unless upon conditions which the plaintiffs refused to assent to. The learned judge finds he recognized the order by stating that it was good. But a recognition of the goodness of the order is not an acceptance; particularly in view of the fact that he declared, at the same time, his inability to deliver the property unless the plaintiffs would wait till he could import it. They declining to wait relieved the defendant from any liability upon his offer.

Had this been a bill for the payment of money, and transmitted to the defendant for acceptance, the retention of the bill would not have justified the inference of an acceptance, either in this country or in England, before the passage of the statutes requiring acceptances of bills to be in writing. Chitty, in his work on Bills, (8th American [Springfield] Edition, 324,) says: "An acceptance may also, as to foreign bills, (except those drawn on France, when a written signed acceptance is required,) be implied

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as well as express; and it is said that it may be inferred from the drawer's keeping the bill a great length of time, or by any other act which gives credit to the bill and induces the holder not to protest it, or is intended as a surprise upon him and to induce him to consider the bill as accepted. But it should seem that the mere detention of a bill for an unreasonable time by the drawer will not amount to an acceptance."

In Story on Bills, section 246, it is said, keeping a bill which is sent to the drawee for acceptance, a considerable length of time *without returning any answer*, may, under circumstances, be treated as an acceptance; especially if, when sent, the drawee is informed that his so keeping it *without returning any answer* will be deemed an acceptance. But as such conduct is equivocal, unless circumstances of a stringent character, such as those above stated, occur, the mere keeping of the bill will not be held to amount to an acceptance. (See also Edwards on Bills, 417, 418).

The rules governing bills of exchange are at least as liberal as those which govern orders for the delivery of personal property, and if the acts proved in this case would not constitute an acceptance of a bill, they would not constitute the acceptance of an order.

Orders for the delivery of personal property do not require any acceptance. They are usually satisfied by a delivery of the property on presentation; and hence it is that possession of such an order, unexplained, is evidence that the drawee has paid it. (1 Cowen & Hill's Notes, 315; *Alvord v. Baker*, 9 Wend. 323.) But there is no such presumption of payment of orders for the payment of money. The presumption in such cases is that the order is drawn on moneys owing by the drawee to the drawer. (See authorities last cited.)

The holder of an order for the delivery of personal property may require an acceptance in writing of the order; and when he does require it, the drawee is bound so to accept. The same considerations that render proper the

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acceptance of a bill or draft in writing, apply with equal force to orders. The holder, until acceptance, has no claim upon or remedy against the drawee, and hence the relations between the holder and drawee are left depending on the acceptance or non-acceptance of the order. Again, the holder is entitled to have the evidence of the acceptance in writing, so far as to relieve him from the difficulties of proof attending a mere verbal or implied acceptance.

If the property is *in esse*, which is required to be delivered, and is ready for delivery, the order is usually accepted by an immediate delivery of the property, or compliance with the order is at once refused.

In this case the plaintiffs did not ask or expect a written acceptance of the order. They sent it forward in the expectation that the property would be at once forwarded, or notice given that it would not be delivered. The defendant declined to accept, and at once notified the plaintiffs of his determination, unless they would accept the conditions which he proposed. This they did not do. After this, retention of the order could have no effect on the relation of the parties.

I cannot agree with the learned judge who delivered the opinion of the court below, that there was no consideration for the acceptance of the order, if it was in fact accepted. If there was a valid contract between Rapelje & Co., and the defendant by which each agreed to sell and deliver to the other, garden seeds, the promise of the one party was a sufficient consideration for the promise of the other. And Rapelje & Co., could have maintained an action for the breach of the contract. It was not necessary that there should be a consideration moving from the plaintiffs to the defendant in order to support an acceptance of the order. In this case, as in all cases of bills of exchange, the consideration for the acceptance moves between the drawer and drawee, and not between holder and acceptor.

Had the court below put their decision upon the ground

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that there was not sufficient evidence of an agreement between R. & Co. and the defendant for the sale by the latter to the former of any quantity of garden seeds, I should have concurred with them. When persons engaged in the business of seed-raising visit dealers in the different parts of the state to ascertain whether any and what quantity of seeds will be required for the ensuing season, it is not expected or intended, I apprehend, by either party that when the country dealer indicates the quantity he will want, a binding contract is thereby made, on the one side to deliver, and on the other to receive the seeds so ordered. It is to be taken rather as an offer by each to the other, and which each may recall at any time before it is accepted. When the contract relied on in this case was made, the defendant had not threshed his carrot seed, and could not, therefore, know whether he would have 1,000 pounds of seed to deliver to any person, and it would be absurd to suppose that R. & Co., dealers in the article, supposed that the defendant obligated himself to deliver to them the quantity indicated, or pay them damages for the omission to deliver.

But there being no acceptance of the draft, this action must fail, whatever might be our views as to the validity of the contract between R. & Co. and the defendant; and, therefore, the order for a new trial must be affirmed, and judgment absolute rendered for the defendant, with costs.

All the judges concurring, judgment affirmed.

Abstract of case.

JOHN C. SMITH v. WILLIAM COUNTRYMAN.

If new matter set up in an answer as a defense is sham, or irrelevant, it is the duty of the plaintiff to move, on notice, to strike it out. If the new matter does not, upon its face, constitute a defense, the plaintiff should demur to it. He can not move, at the trial, to strike it out, on the ground that the facts stated do not constitute a valid defense to the action.

A judge has no power to strike out pleadings, on the trial. All objections to the pleadings should be decided before the circuit.

An executory contract for the sale of personal property, entered into upon false and fraudulent representations made by the purchaser, to induce the vendor to make the same, and upon the truth of which representations the latter relied, cannot be enforced. Whatever facts would enable a party to avoid a contract, are equally available to enable him to defeat one sought to be enforced against him.

Upon a negotiation between C. and W. for the sale by C. of his crop of hops, W., to induce C. to sell him the hops, represented that he had purchased E.'s hops for the price of twelve and one-half cents per pound. C. was ignorant of the price of hops, and was reluctant to sell; but relying upon this representation of W., and believing the same to be true, and having confidence in the prudence and judgment of E., he entered into an agreement with W. to sell him his hops for twelve and one-half cents per pound. The statement as to the purchase of E.'s hops by W. being untrue; *Held*, that C. was at liberty to refuse to fulfill the contract, on discovering the fraud, and that the law would not subject him to damages for the breach.

Held, also, that in an action against C. for a breach of his agreement to deliver the hops, evidence of his *belief* in the representations made by W., as to his having purchased E.'s hops, and that he entered into the contract relying on that representation, was properly received, and that the court did not err in refusing to strike out such evidence as being immaterial and constituting no defense.

Any representation that affects the price of an article, in regard to which one party places confidence in the other, will, if relied on, and is false, and the party trusting to the representation is injured, render the contract void. *Per* MULLIN, J.

A vendor of property may put upon the purchaser the responsibility of informing him correctly, as to the market value, or any other fact known to him, affecting the market price of the property, and if the purchaser answers untruly the purchase will be void, by reason of the fraud. The purchaser is not bound to answer, in such a case; but if he does, he is bound to speak the truth. *Per* MULLIN, J.

Statement of case.

Appeal from a judgment of the Supreme Court in the fourth judicial district.

THE action is to recover damages for the breach of a contract to deliver a quantity of hops. The defendant agreed in writing with one H. R. Wood to sell and deliver to him, at the railroad depot at Fort Plain, all his crop of hops for the year 1860, put up in bales and delivered in good merchantable order, on the 20th of October in that year. Wood was to receive and pay for the hops twelve and a half cents per pound. The defendant's crop that year amounted to 3,409 pounds. Wood was ready and willing to receive and pay for them at the time and place agreed upon. The defendant neglected or refused to deliver them. Such hops were proved to have been worth, at the time they were to be delivered, thirty cents a pound; and the difference between the contract price agreed to be paid for them and the value at the time and place of delivery was \$596.57, and which the plaintiff claimed as damages for the breach of the contract. The contract had been assigned to the plaintiff. The defendant set up, by way of defense, in his second answer, that, at the time of making the contract, he was ignorant of the price of hops and reluctant to make the agreement. That Wood represented to him that he, Wood, had purchased the crop of one Henry Elwood, a large and experienced hop-grower, at twelve and one-half cents per pound, and that he, the defendant, believing such statement, and having faith and confidence in the sagacity, prudence, and judgment of Elwood, entered into such agreement. He then alleges that the statement of Wood that he had purchased Elwood's hops was false and fraudulent; was made to deceive and defraud the defendant; and that, by such false and fraudulent representation, he, the defendant, was actually deceived and induced to enter into such agreement, which was very disadvantageous, as hops were then worth more than twelve and one-half cents per pound; and that, immediately thereafter, there was a great rise in the price of hops. On the

Statement of case.

trial, the agreement was proved; the price of hops, at the time the delivery was to be made by the terms of the agreement, was twenty-eight to thirty cents per pound. The agreement bore date August 14th. The price of hops on that day was shown to be from twelve to twelve and a half cents per pound. Upon this proof the plaintiff rested his case, and the defendant moved for a non-suit, which was denied by the court, and the defendant's counsel excepted. The plaintiff then moved to strike out the second ground of defense, above stated, for the reasons that the facts therein stated did not constitute a fraud; and that, if the representations were made as set forth in the answer, they were immaterial and constituted no defense to the action. The court denied the motion, and the plaintiff excepted. The defendant was then permitted to prove, and did prove, the facts as set forth in the answer, except the averment therein that, at the time of the execution of the agreement, hops were worth more than twelve and one-half cents per pound, by himself and other witnesses, named Miller and Cronkhite. And it also appeared from the testimony that, at the time of the negotiation, Wood showed the defendant his book, wherein he had entered several contracts made by him with hop-growers for their crops at twelve and one-half cents per pound. That Elwood's name was not on the book among those with whom contracts had been made. Wood was also sworn, and testified that he told the defendant that he expected to purchase Elwood's crop of hops; and it was admitted on the trial that Wood had not purchased any hops of Elwood. The plaintiff moved to strike out the evidence given by the defendant and Miller and Cronkhite, so far as the same related to the representations made by Wood of the purchase of Elwood's hops, as being immaterial and constituting no defense to the action; which motion was denied, and the plaintiff excepted. The defendant had testified that he had said to Wood, if, what he, Wood, had said was so, in regard to Elwood's hops, he would enter into the contract with him.

Statement of case.

Appeal from a judgment of the Supreme Court in the judicial district.

THE action is to recover damages for the breach of tract to deliver a quantity of hops. The defendant in writing with one H. R. Wood to sell and deliver at the railroad depot at Fort Pluin, all his crop of the year 1860, put up in bales and delivered in g chantable order, on the 20th of October in t Wood was to receive and pay for the hops tw half cents per pound. The defendant's crop amounted to 3,409 pounds. Wood was ready to receive and pay for them at the time and 1 upon. The defendant neglected or refused to c Such hops were proved to have been wortl they were to be delivered, thirty cents a po difference between the contract price agree for them and the value at the time and pla was \$596.57, and which the plaintiff claimed the breach of the contract. The contract ha to the plaintiff. The defendant set up, by in his second answer, that, at the time of tract, he was ignorant of the price of h to make the agreement. That Wood re that he, Wood, had purchased the cro Elwood, a large and experienced hop- and one-half cents per pound, and that believing such statement, and having f in the sagacity, prudence, and judgment into such agreement. He then allege of Wood that he had purchased Elv and fraudulent; was made to decei defendant; and that, by such false sentation, he, the defendant, was : induced to enter into such agreeme advantageous, as hops were then w and one-half cents per pound; and after, there was a great rise in the

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The defendant then added: "I did believe the representation made that he had purchased Elwood's hops." This answer was objected to by the plaintiff's counsel as improper and immaterial; but the objection was overruled, and the plaintiff's counsel excepted. The defendant then testified, without objection, that he entered into the contract relying on that representation, and that, soon afterwards, he ascertained its falsity. The jury found a verdict for the defendant, and the judgment entered therein was affirmed at the general term. The three exceptions taken by the plaintiff on the trial to the rulings of the court, present the only questions arising for the consideration of this court upon this appeal.

A. Hees, for the appellant.

I. The court erred in refusing to strike out the evidence of the defendant, and Miller and Cronkhite, as well as refusing to strike out the second defense set forth in the defendant's answer, for the reason that neither of them constitute or establish a fraud, or constitute a defense to the action.

1. Admitting the representations testified to by the defendant Countryman and Miller, that he had purchased Ellwood's hops at twelve and a-half cents per pound, it was simply the declaration what a third person had done, which was no reason why he should do the same thing, and therefore does not constitute a fraud, or fraudulent representation to avoid a contract. Chancellor KENT, in his Commentaries (vol. 2, 8th ed. p. 634), says: "The cases have gone so far as to hold that if the seller should even falsely affirm that a particular sum had been bid by others for the property, by which means the purchaser was induced to buy, and was deceived as to the value, no relief was to be afforded; for the buyer should have informed himself, from proper sources, of the value; and it was his own folly to repose on such assertions, made by a person whose inte-

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rest might so readily prompt him to invest the property with exaggerated value. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.*" On page 635: "The same principle was laid down in a late case in the K. B., where it was held that a false representation by the buyer in a matter merely *gratis dictum*, in respect to which the buyer was under no legal pledge or obligation to the seller for the precise accuracy of his statement, and upon which it was the seller's own indiscretion to rely, was no ground of action." (See also *Vernon v. Keys*, 12 East Rep. 632; See also Story's Equity Jurisprudence, 4th edition, § 199; *Davis v. Meeker*, 5 John. R. 354.) Fraud is a question of fact for a jury, where there is any evidence tending to establish it. But whether the evidence tends to establish fraud or not, is always a question of law for the court. (*Erwin v. Voorhees*, 26 Barb. 127.) The authority relied upon by the defendant, on the trial, against striking out the evidence of the defendant, Miller and Cronkhite, will be found in 20th N. Y. R. 32 (*Valton et al. v. The National Fund Life Assurance Company*). The note is as follows: "A policy of insurance is avoided by a fraudulent representation in respect to a fact not material to the risk, if, in the judgment of the insurer, it be material in respect to inducements to undertake the risk." It was upon this authority the learned judge who tried the cause denied the motion. It is insisted that the law of contracts of insurance and contracts of sale is different, and rests on different principles. The parties do not deal, in that instance, on the presumption of equal knowledge and vigilance as to the subject matter of the contract, and hence a different rule of law prevails. The insurer is essentially passive, and is known to act, and professes to act, upon the information of the assured. In an insurance contract, the special acts, as Lord MANSFIELD has observed (*Carter v. Boehm*, 3 Burr. R. 1905), upon which the contingent chance is to be computed, lie most commonly within the knowledge of the insured only. "The underwriter trusts to his representations," and proceeds

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upon the confidence that he does not keep back any circumstance within his knowledge. (*Lindenau v. Desbrough*, 8 Barnw. & Cres. 386.) Though the suppression should happen through a mistake, without any fraudulent intent, the policy is void. The contract of insurance is formed upon principles peculiar to itself, and the common law maxim, *caveat emptor*, has no application. (See note, 2d Kent's Com. 8th ed., p. 637; See also 3d Kent's Com., 8th ed., 351 to 363—the law upon contract of insurance.)

2. The false and fraudulent representations claimed to have been made by Wood, are immaterial, and constituted no fraud or defense to the action, as the evidence given on the part of the plaintiff shows that twelve and a half cents was the market price, and the highest price paid for hops by any one at the time the contract was made; and the representations made, as insisted upon by the defendant, that he had purchased Ellwood's hops at twelve and a half cents, that being the market price, and the highest price paid, and no evidence being offered or introduced by the defendant showing that hops were worth more than twelve and a half cents, worked no injury to the defendant, as he was receiving the highest market price for his hops.

3. The representation of Mr. Wood that he had purchased Ellwood's hops at the same price that he agreed to pay the defendant (to wit: twelve and a half cents per pound), was not such a false and fraudulent representation as to avoid the contract, as there was no misrepresentation as to market value or price paid. (See cases above cited.)

4. There can be no fraud without damage, and the evidence shows the defendant was receiving by the contract the highest market price at the time the contract was made, and consequently he sustained no injury. In the case of *Harris v. Ransom* (24 Miss. Rep. 504), the court say: "A party seeking to avoid a contract upon the ground of fraud, must not only prove the fraud, but that he has sustained

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injury from it." Again, COKE, J., in 3 Bulstrode's Reports, 952, says: "Fraud without damage, or damage without fraud, gives no cause of action." (See Note C, 2 Kent's Com. 8th ed. 638.)

5. The defendant can not now avail himself of the false representations made by Wood as to the purchase of Ellwood's hops; as the proof shows Ellwood was a near neighbor to the defendant, and he was bound to exercise ordinary prudence and discretion. The means were within his control to ascertain the truth or falsity of the representations; and if he failed to acquire such information, the failure is attributable to his own neglect and want of ordinary prudence as to those representations. (*Davis v. Sims & Bates*, Lalor's Sup. to Hill & Denio, 235.) In such a case the rule, *caveat emptor*, emphatically applies. (*Starr v. Bennett*, 5 Hill, 303, 304, 305 and 306; *White v. Seaver*, 25 Barb. 242.) In the case of *Van Epps v. Harrison* (5 Hill, 67), which was for a false representation as to the situation of a farm, within ten hours' ride of the plaintiff, Chief Justice BRONSON says: "It will seem marvelous, if not wholly incredible, to those who did not live in the years 1835 and 1836, that men should purchase lands within ten hours' ride of their residence, and agree to pay \$32,000, without ever having taken the trouble to look at the property." And again, on the same page, he says: "He trusted to the representations of the plaintiff in relation to the condition of the property, and the only question is whether the defendant must charge the loss upon his own folly, &c. The credulity of the defendant furnishes but a poor excuse for the falsehood and fraud of the plaintiff, and he will have no just cause for complaint if he is held responsible for his misconduct." The same doctrine is held in *White v. Seaver* (25 Barb. 235, 242); see also, *Tallman v. Green* (3 Sand. R. 441 and 442.)

II. The court erred in admitting the evidence of the defendant: "I did believe the representations made that he had purchased Ellwood's hops." (*Rich v. Jakway*,

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(18 Barb. p. 357; *Murray v. Bethune* 1 Wend. 191, see page 196.)

III. The defendant alleges, in his answer "that, by such false and fraudulent representations, he was actually deceived and induced to enter into said agreement, which was a very disadvantageous one, as hops were *then worth more than twelve and a half cents per pound.*

1. This allegation would seem to be the gist of the whole answer. No evidence was given by the defendant to prove the truth of this portion of the answer; but, on the contrary, the sum of twelve and a half cents, the price agreed upon, was the highest market price; consequently, the agreement was not a disadvantageous one, as alleged in the answer, and this is the real injury complained of by the defendant.

2. The defendant, in his answer, also alleges: "That he relied upon the representations of Wood that he had purchased Ellwood's hops, who was a large and experienced hop-grower of that town, and that he had faith and confidence in the sagacity, prudence and judgment of said Ellwood, and was, therefore, induced to enter into said agreement. This allegation is unsupported by any evidence given by the defendant. On the direct examination of the defendant, he testifies: "Ellwood had grown hops one year." In his cross-examination he testifies: "In 1860 it was the first year that Ellwood grew hops"—the same year the contract in this action was made. The defendant testified: "If Mr. Ellwood had sold his hops for six cents, I think I would have sold mine; if he had sold his hops for three cents, I think I would have sold mine." It is submitted that the defendant presumes much upon the credulity of the court when he alleges that he relied upon the skill, prudence and judgment of a man who never had, at the time the contract was made, grown a single pound of hops, and there is no evidence that Ellwood ever bought or sold any hops whatever. The defendant himself testified that he (the defendant) had been a hop-grower for six

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years, and was well qualified to judge of the market value of hops; and that Ellwood's skill and prudence, which he claims he relied upon, in that respect was no better than that of any other ordinary individual, who had never grown or bought or sold any hops.

IV. His Honor, Justice JAMES, in his opinion to sustain the judgment below, says: "The jury having found for the defendant, the questions of fact presented by the issues must be regarded as settled in favor of the defendant." His honor passes over, without remark, that those very issues were given to the jury under exceptions taken by the plaintiff.

1. On motion of the plaintiff to strike out the second defense set up in the defendant's answer, for the reason that the facts therein set forth do not constitute a fraud.

2. That if the representations were made as set forth in the defendant's answer, they are immaterial, and constitute no defense to the action.

3. In admitting the evidence of the defendant, "entered into the contract, relying on that representation; "I did believe the representation made, that he had purchased Ellwood's hops," which was objected to by the plaintiff's counsel, and overruled by the court, to which ruling the plaintiff, by his counsel, then and there excepted. Justice JAMES, in his opinion, has fallen into another error. He says: "The defendant at first declined, and to induce him to contract, Wood asserted that one Ellwood, an extensive hop grower, and a person in whose judgment and opinion Wood knew the defendant had great confidence, had contracted with him," &c. The case shows an entirely different state of facts. Ellwood was not an extensive hop grower; that was the first year he ever grew hops, and so the defendant testified. The case shows Wood was a stranger to the defendant, and also a stranger to Ellwood, nor did Wood know that the defendant knew Ellwood, or that he, Ellwood, was a near neighbor to the defendant, until the time of making the contract. The defendant

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examined Wood's book containing the names of the persons with whom he had purchased hops, and with the prices; so the defendant testified. His honor cites the case of *Watson v. Palson* (7 S. & E. 585), as authority to show "if a man tell an untruth, knowing it to be such, who acts accordingly, and thereby sustains damage, the party making the false statement is liable for the deceit, even though he intended no fraud in making the representation." Also the case of *Pollhill v. Walter* (3 B. & Ad. 114), holding the same doctrine. That principle is so familiar that it hardly needed a reference to those authorities, but, unfortunately for his honor, those authorities do not reach the case in hand. There was no misrepresentation as to price; the defendant got the highest market price for his hops, and consequently sustained no damage.

S. & R. Earl, for the respondent.

I. The evidence, as to the defendant's belief in the truth of Wood's representation that he had purchased Ellwood's hops, objected to by plaintiff, was competent, and the exception was not well taken. (*Seymour v. Wilson*, 4 Kernan. 567; *Pope v. Hart*, 35 Barb. 630; *Bush v. Lathrop*, 22 N. Y. 549, 550; *Griffin v. Marquardt*, 21 N. Y. 121; *Forbes v. Waller*, 25 N. Y. 430.)

II. The exceptions to the refusal of the court to strike out the second defense in the answer were not well taken.

1. A party cannot properly, at the circuit, without any prior notice, move to strike out any portion of a pleading. This defense was not sham or irrelevant within the meaning of section 152 of the code; and, if it was irrelevant, the motion to strike it out should have been brought on on notice. The remedy of plaintiff, if the alleged fraud constituted no defense, was to demur, under section 153 of the code. The plaintiff not having made such motion nor demurred, the pleading must stand as part of the record.

2. The evidence of the defendant and of Miller and

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Cronkhite, which the plaintiff moved to strike out, was taken without objection. Hence the court had no right to strike it out. If the court had the right, it was not bound to do it; it was a matter of discretion. (*Hall v. Earnest*, 36 Barb. 585.) Hence we submit that none of the plaintiff's exceptions were well taken; and, as this court cannot look into the evidence to see if the verdict was warranted by it, the judgment must be affirmed.

III. But if the main question is here for review, then we submit that the fraud alleged and proved was such as to avoid the contract and constitute a defense to the action.

1. Frauds are of infinite variety, and it is impossible to lay down any general rule as to what representations will avoid a contract, which will cover all cases. Each case will depend upon its own circumstances. (2 Parsons on Contracts, 266; Chitty on Contracts, 681.)

2. For the same reason it is impossible to reconcile the decided cases involving questions of fraud and the numerous dicta on the subject of fraud that are to be found in the books.

3. The general rule, founded in natural justice and equity, is that a party has the right to avoid a disadvantageous executory contract, which he has been induced to enter into by the false and fraudulent representations of the other party. To this rule there are some exceptions.

(a.) It is said that the representations must be material. This is undoubtedly true. But all representations must be deemed material upon which a party relied and by which he was induced to enter into the contract; and whether the representations were material or not is generally a question of fact for the jury.

(b.) It is said that the representations must be such as the party had the right to rely upon, and in which he had the right to repose confidence. This must depend upon the circumstances of each case.

(c.) The representations must not be as to a fact that is equally open to the observation and inspection of both

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parties; for, as to such facts, it is said that both parties are presumed to act upon their own judgment and information. Under this exception would come representations as to defects open to ordinary observation and inspection or discoverable by ordinary prudence, and as to market value in cases where the knowledge of it is equally accessible to both parties.

4. In this case the defendant brings himself within the rule qualified by all these exceptions.

(a.) The representations were false.

(b.) They were made with intent to deceive and defraud.

(c.) They were material, inasmuch as they were relied upon and induced the defendant to sign the contract. As he was not posted as to the price of hops and the hop trade, he had the right to rely upon the judgment and skill of another person whom he believed to be posted. They were representations, in one sense, affecting the value of hops and the chances of the defendant to make a favorable sale.

(d.) The defendant had the right to rely upon the representations because they were as to a fact peculiarly within the knowledge of the person making them, and he had the right to repose faith and confidence in him, because he asked him for the truth and informed him that he contracted relying upon what he said.

(e.) The representations were of a fact not equally known to both parties. Neither did both parties have equal facilities for learning or knowing the existence of the fact. The truth could only be learned from Wood or from Ellwood. It was not a fact like market value ordinarily accessible to all. It was a fact which the defendant could only learn by inquiry, and he exercised all the prudence and foresight which the law requires, by inquiring of and relying upon Wood. He might not have been able to learn the truth elsewhere. Besides, Wood refused him time to inquire elsewhere, and thus compelled him to rely upon his representations as to the fact.

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(f.) The representations threw the defendant off from his guard, and prevented him from making inquiries, as to the price and value of hops, which he otherwise would have made.

(g.) The defendant was not in fault for not ascertaining the falsity of Wood's representations before he contracted, because Wood, in order to perpetrate his fraud more effectually, refused to give him an opportunity to see Ellwood.

(h.) Suppose Wood had falsely said that he had just received a telegram that the market price for hops in New York was twelve and one-half cents per pound only, when in fact it was fifteen cents; or, suppose he had falsely said that the hop quotations in the New York papers for that day, which the defendant had not seen, were twelve and one-half cents per pound, when, in fact they were fifteen cents, and he had refused to give the defendant time to learn the truth as to his representations, and the defendant had been, by such representations, induced to enter into a contract at twelve and one-half cents, could it be said that such representations were not material, or that the defendant had no right to repose confidence in them?

(i.) The defendant was damaged by the representations, as he was induced by them to enter into a very disadvantageous contract. It matters not that he was to have the market value of hops at the time he signed the contract, as the contract, if valid, deprived him of the market value at the time he was to deliver them.

5. Hence we say that the court below, in holding that the misrepresentations complained of constituted a legal fraud which rendered the contract void, violated no principle of public policy or rule of law. (Chitty on Contracts; 1 Parsons on Contracts, 461; 2 Parsons on Contracts, 264, *et seq.*; Story's Eq. Ju. secs. 192, 200; *Risney v. Shelby*, 1 Salkeld, 211; *Palsey v. Freeman*, 3 T. R. 57; *Watson v. Poulson*, 7 Eng. Law and Eq. 585; *Laidlow v. Organ*, 2 Wheaton, 123; *Benton v. Pratt*, 2 Wend. 385; *Sanford v. Handy*, 23 Wend. 259, 268; *Starr v. Bennett*, 5 Hill,

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303; *Taylor v. Fleet*, 1 Barb. 471; *Bench v. Sheldon*, 14 Barb. 66; *Newbery v. Garland*, 31 Barb. 121, 130; *White v. Merritt*, 3 Seld. 352, 356; *Bronson v. Wiman*, 4 Seld. 182; *Haight v. Hayt*, 19 N. Y. 464; *Vallon v. The National, &c. Assurance Co.*, 20 N. Y. 32, S. C. 17 Abb. 268; *Hill v. Bush*, 19 Arkansas, 522; *Harwood v. Gould*, 28 Vt. 524; *Ives v. Carter*, 24 Conn. 392; *Pennock v. Filford*, 17 Penn. 456; *Oldham v. Bently*, 6 B. Monroe, 428; *Weatherford v. Fishbeck*, 3 Scam. 170; *Medbury v. Watson*, 6 Metcalf, 246.) It is submitted, therefore, that the judgment should be affirmed.

DAVIES, J. If the new matter set up by the defendant, as constituting a defense, was sham or irrelevant, it was the duty of the plaintiff to have moved on notice to strike it out. (Code, § 152.) If the new matter did not, upon its face, constitute a defense, it was the duty of the plaintiff to have demurred to it. (Code, § 153.) The practice resorted to in this case, to correct the pleadings by motion at the trial is not warranted by the code, and should not be encouraged. The plaintiff, in substance, by his motion to strike out the second ground of defense, admitted the allegations of the answer, and the question was presented to the court in the same form as if he had demurred to the answer. A moment's consideration will show how incongruous and inconvenient it is to reserve questions of law for argument and decision at the circuit. But assuming the question was properly raised there, then it is to be considered whether the new matter, set up in the answer, upon its face constituted a defense to the action. And the question to be decided is in substance the same, whether it is put on the motion to strike out that defense, or upon the motion to strike out the testimony which was given to establish it. In the first place it is to be borne in mind that the plaintiff in this action is seeking to enforce an executory contract, made and entered into by the defendant, as conceded by him, upon false and fraudulent repre-

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sentations made by the plaintiff's assignor, to induce him to make the same, and upon which it was admitted he, the defendant, relied. The statement of the proposition would seem sufficient to suggest the answer which the law should make. In the aspect we are now regarding the case, we are to take the statements of the defendant's answer as true. They are that he was ignorant of the price of hops, and was reluctant to make the agreement with Wood, the plaintiff's assignor; that Wood, to induce the defendant to sell him his hops and enter into the agreement, represented that he had purchased the hops of one Ellwood, a large and experienced hop grower, for the price of twelve and one-half cents per pound; and that, relying upon such representation, and believing the truth thereof, and having confidence in the prudence and judgment of Ellwood, the defendant entered into the agreement. That hops were, at that time, worth more than twelve and one-half cents per pound; that such representations were false and fraudulent, and made with the intent to deceive and defraud the defendant. It is now urged that it was the folly of the defendant that he relied upon these representations of Wood; that it was his duty to have made inquiry of Ellwood, to ascertain the truth of the representations, before he entered into the contract. In other words, the defendant should have assumed that Wood's statements, if not untrue, were at least doubtful, and that he is to suffer for having given them credence, while the party knowingly making the false representations is to reap the fruits of his fraud, because the party dealing with him did not distrust him. It was well observed by the court, in *Van Epps v. Harrison* (5 Hill, 63), that the credulity of the defendant furnishes but a poor excuse for the falsehood and fraud of the plaintiff, and the latter will have no just ground of complaint if he is held responsible for his misconduct. That was an action upon a bond given upon a sale of land by the plaintiff to the defendant, and as a defense to the action the defendant set up that the plaintiff falsely and

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fraudulently represented to him that he had just purchased and paid \$32,000 for the land, when in truth he had paid but \$16,000. And the court was of the opinion that the false affirmation concerning the price paid for the land furnished a good defense to the action.

It is true, as contended for by the counsel for the appellant, that the fraud which will vitiate a contract must be material, and that it must relate distinctly and directly to the contract, and must affect its very essence and substance. Parsons, in his work on contracts, (2 Parsons, 267,) observes that there is no positive standard by which to determine whether the fraud be thus material or not, but that no better rule for deciding the question can be given than this: "If the fraud be such that, had it not been practised, the contract would not have been made or the transaction completed, then it is material to it." Applying this rule to the case at bar, in the aspect we are now considering it, and the materiality of the representation is placed beyond all question. The defendant says: that, being ignorant himself of the value of hops, and knowing the prudence and judgment of Ellwood, he, in reliance on the representation that Ellwood had sold his hops to Wood at the price named, entered into the contract to sell his hops to him at the same price. Whatever facts would enable a party to avoid a contract, are equally available to enable him to defeat one sought to be enforced against him. Could this defendant, therefore, have sought the aid of a court of equity, upon the facts stated in his answer, to set aside this contract? The authorities are abundant to show that he could. In *Daggett v. Emerson* (3 Story's Rep. 733), Mr. Justice STORY states the principles by which courts of equity can be governed in such cases in the following elegant and forcible terms, and these observations have peculiar force and significance as applicable to the present case. He says: "It is equally promotive of sound morals, fair dealing and public justice and policy that every vendor should distinctly comprehend, not only that good faith should

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reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should literally, in his representations, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable, and it is usually immaterial whether the representation be wilfully and designedly false, or ignorantly and negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters or proclaims, or knowingly impresses upon the vendee, as a true or decisive motive for the bargain." In *Taylor v. Fleet* (1 Barb. 471), the vendee sought the aid of a court of equity to set aside a conveyance and sale of real estate on the ground that the vendor had made a representation, in regard to the land, which was untrue; and the court held that, the vendee having ascertained that the representation was untrue, had the right to rescind the contract. That, whatever may have been the motive of the vendor in making an erroneous representation respecting the land about to be sold to him, it is enough to entitle the purchaser to relief; that there was a misrepresentation of a matter of fact, material to the subject of negotiation, and which constituted the very basis of the contract. The court said: "The representation being untrue and influential, vitiated the transaction, whether such representation was wilfully and designedly false or ignorantly or negligently untrue." (See also opinion of Mr. Justice WOODBURY, 9 Law Rep. 160, *Warner v. Daniels*; Story's Eq. Juris. §§ 192, 193; *Hough v. Richardson*, 3 Story's Rep. 659; *Bennett v. Judson*, 21 N. Y. 238.)

In *Neville v. Wilkinson* (1 Bro. Ch. Rep. 546), Lord Chancellor THURLOW said: "It has been said here is no evidence of actual fraud on R., but only a combination to

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defraud him. A court of justice would make itself ridiculous if it permitted such a distinction. Misrepresentation of circumstances is admitted, and there is positively a deception;" and he added: "If a man, upon a treaty for any contract, will make a false representation by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud. It misleads the party contracting, on the subject of the contract." In harmony with the doctrine of these cases is the principle laid down by this court in the case of *Valton v. National Fund Life Insurance Co.* (20 N. Y. 32). It was there decided that fraudulent representations made by the assured to the insurer, upon his application for a policy, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, would avoid the policy. And this court held that a misrepresentation, although it did not affect the nature of the risk, yet was a fraud, because it induced a confidence, without which the party would not have acted. This principle covers the whole ground in controversy in the present action, and if applicable to the present case, is decisive of it. But it is urged, by the appellant's counsel, that the law of contracts of insurance and contracts of sale are different, and rest on different principles. That the parties do not deal, in the former case, on the presumption of equal knowledge and vigilance as to the subject matter of the contract, and that hence a different rule of law prevails. It is true that in contracts of insurance all representations material to the risk, if untrue, avoid the policy, but representations not material rest on the ground of fraud, and therefore vitiate the policy on that ground. This distinction was urged upon the attention of the court in the case of *Moens v. Heyworth* (10 Mees. & Welsby, 147). In that case the question was whether a contract for the sale of coffee, which was represented to be invoiced to the seller, was void, from the fact that such representation was untrue, and it was held that it was. Lord ABINGER,

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Chief Baron, said: "The fraud which vitiates a contract, and gives the party a right to recover, does not in all cases necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances in which the party may believe to be true. In policies of insurance, for instance, if an insurer makes a misrepresentation, it vitiates the contract. Such contracts, it is true, are of a peculiar nature, and have relation as well to the rights of the parties as to the event. In the case of a contract for the sale of a public house, if the seller represent, by mistake, that the house realized more than in fact it did, he would be defrauding the purchaser and deceiving him, but that might arise from his not having kept proper books, or from non-attention to his affairs, yet as soon as the other party discovers it, an action may be maintained for the loss consequent upon such misrepresentation, inasmuch as he was thereby induced to give more than the house was worth;" and he further observed that "the question of fact whether there was fraud or not ought to be decided by the jury from the circumstances of the case." PARKE, Baron, remarked: "The case of a policy of insurance does not appear to me to be analogous to the present; those instruments are made upon an implied contract between the parties that every thing material known to the assured should be disclosed by them. This is the basis on which the contract proceeds, and it is material to see that it is not obtained by means of untrue representation or concealment in any respect." "In this case," he says, "the plaintiffs must prove a representation by words or acts of that as true which was known to the defendants to be untrue, as in the cases of *Polhill v. Walter* (3 B. & Adol. 114), and *Foster v. Charles* (6 Bing. 696). In the same case Lord TENTERDEN laid down the rule that it is not necessary to prove that the false representation was made from a corrupt motive of gain to the party making it, or a wicked motive of injury to the other party; it was enough if a representation is made, which the party making

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it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated to induce another to act, on the faith of it, in such a way that he may incur damage, and that damage is actually incurred." In *Foster v. Charles* the same doctrine is reiterated, and PARK, J., quotes, with approbation, the remark of CHAMBRE, J., in *Tripp v. Lee* (3 Bos. & P. 371), that it would be an absurdity in law to hold that if a man draws another into a snare, the party suffering should have no remedy by action.

It is perfectly clear, therefore, from principle and authority, that if the plaintiff had demurred to the second ground of defense contained in the defendant's answer, as not sufficient in law, the demurrer would have been overruled, and judgment given for the defendant. The judge therefore properly refused to strike out the second ground of defense as stated in the answer. He also properly refused to strike out the testimony which the defendant had adduced to sustain the answer. Such testimony proved every material fact contained in the answer, except the allegation that hops were at the time the defendant made the contract worth more than twelve and a half cents per pound. Such fact had no materiality in excusing the plaintiff's assignor, from the fraud practised upon the defendant. *Non constat*, that the defendant would have entered into this contract if he had known that circumstance. The question here is, whether a contract obtained from a person by fraud and falsehood can be enforced against him by the party procuring it. I think clearly it cannot. It is undeniable that if it could have been enforced, if the defendant had fulfilled it, he would sustain thereby great damage; and it is no answer, for the plaintiff to say, that the defendant might on that day have sold his hops either to Wood, or some one else, for the same price, if the fraud had not been practised. The defendant was at liberty to refuse to fulfil the contract on his part, as soon as he ascertained the fraud practised upon him, and the law will not subject him to the damages

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which the plaintiff or his assignor may have sustained, from their inability to realize the fruits of this fraudulent act. The motion to strike out the defendant's testimony was therefore properly denied.

The evidence of the belief of the defendant in the representation made by Wood was perfectly proper. It cannot be permitted to the plaintiff to object that the defendant credited the statement of his assignor. The defendant was not to assume it was untrue, and the law would have assumed that he gave credit to the representation whether he had so testified to it or not. But this objection is wholly immaterial, as the defendant testified, without objection, that he entered into the contract relying on that representation, namely: the representation that he, Wood, had purchased Ellwood's hops. This shows beyond all controversy that he believed the representations to be true, and his statement that he so believed it was of no importance. The judgment appealed from should be affirmed.

MULLIN, J. The plaintiff's counsel intended to raise on the trial the question whether, assuming the representations to have been made as alleged in the answer, they furnished any legal ground for declaring the sale void by reason of the vendee's fraudulent representations? But I think he has wholly failed to present any such question.

There are but three exceptions in the case. The first is to the denial of the plaintiff's motion to strike out the second defense, because, 1st. The facts therein stated do not constitute fraud; and, 2d. The representations, if made as set forth in the answer, were immaterial and constituted no defense to the action. The second exception is to the admission of the evidence, on the part of the defendant, whether he believed the representations of the vendee that he had purchased Ellwood's hops? The third was the exception to the refusal of the court to strike out the evidence of the defendant and the witness Cronkhite, so far

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as the same relates to the representations made by Wood of the purchase of Ellwood's hops, as being immaterial and constituting no defense to the action.

I know of no authority authorizing a plaintiff to move at the trial to strike out an answer or defense. When parties go down to trial, it is the duty of the court to try the issues made by the parties. If the answer presents no defense, the plaintiff may demur or move to strike out as sham or irrelevant. (Code, § 152, 154.) This motion must be made before the cause is brought on for trial, for the obvious reason that it must be made before the case can be said to be at issue; and, until after issue joined, the case cannot be noticed for trial.

It is competent for a plaintiff to lie by without demurring or moving to strike out, and on the trial object to the evidence offered in support of the answer or defense as not constituting a defense. And the court may in its discretion, reject it, or it may refuse to do so and leave the party to have recourse to some other way of presenting the question.

Under the former system the judge at *nisi prius* had nothing to do with the pleadings. His duty was to try the issues presented by the circuit roll, and it was for the court in banc to dispose of the questions of law arising from improper or defective pleadings. The circuit judge had not power to allow even an amendment of the pleadings.

The powers of the judge at circuit are now much more extensive, he being authorized to allow amendments as fully as the court might do at general or special term, and superadded to these powers a special term is held by the same judge with the circuit. But extensive as his powers are, I think he has not the power on the trial to strike out pleadings. The party whose pleading is proposed to be stricken out, has the right to require that all objections to the pleadings shall be decided before the circuit, so that he may know what he is called on to prove to support his own case and the causes of action or defense on which his adversary relies.

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Judge BRONSON, in *Reynolds v. Lounsbery* (6 Hill, 534), says: "A fault in the pleadings is not a proper ground for tendering a bill of exceptions. After the defendant had omitted to demur to the declaration, he could only take an objection to its sufficiency by motion in arrest of judgment or a writ of error."

It was said by BARCULO, J., in *Fox v. Hunt* (8 How. Pr. R. 12), and by CADY, J., in *Myatt v. Saratoga M. Ins. Co.* (9 How. Pr. R. 488), and by HARRIS, J., in *Richtmyer v. Haskins* (9 id. 481), that it was the correct practice at the circuit to lay out of the case all irrelevant allegations and immaterial issues in the case, and if the complaint does not contain a good cause of action, or the answer does not contain a defense, to direct judgment accordingly. I cannot concur with the learned judges, in their views of the practice, without some limitation. Section 148 of the code permits the defendant to raise, at any stage of the action, the objection to the complaint that it does not contain a cause of action. But section 153 of the code permits a demurrer to an answer containing new matter, when upon its face it does not constitute a counterclaim or defense, and the plaintiff may demur to one or more of such defenses or counterclaims, and reply to the residue of the counterclaims.

If the plaintiff omits to demur to an answer or defense, it must, for the purposes of the issue, be deemed sufficient in law, subject to the power of the court to reject evidence which, if received, could not constitute a defense or counterclaim.

Where it was decided that parties were entitled to whatever relief the evidence given on the trial entitled them, without regard to the pleadings, the judge at the circuit would have had the power to conform the pleadings to the proof, aside from the provisions of sections 169 and 173 of the code. The learned judges to whom I have referred seem to have thought the course indicated by them to be not only proper but necessary, inasmuch as the code, as

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then construed, did not allow a demurrer to an answer, unless it contained a counterclaim. But since the amendment of section 153, in 1855, and especially since its amendment in 1857, permitting a demurrer to the answer without limitation, except that it should contain new matter, all pretense for interference with the pleadings at the circuit other than conforming them to the proof is at an end, and the rule laid down by BRONSON, Justice, in 6 Hill, 534 (cited *supra*), is the only one that can be followed and not introduce into the practice at the circuit the uncertainty and confusion which prevails in justices' courts, where an unlimited right of amendment exists, and where parties can not know, by the issue joined, what the issue will be that they will be required to try.

All the provisions of the code relating to the amendment and correction of pleadings contemplate that the steps necessary to make them sufficient shall be taken before the trial. This is absolutely necessary to prevent injustice, suspense and disorder in the trial of causes at the circuit.

But the learned judges to whom I have referred have not gone the length of holding that although they may disregard immaterial issues at the circuit they would do it by striking out pleadings.

As I have already shown, it can be legitimately reached by excluding the evidence offered in support of such an issue; but unless the case is a very clear one, the best course is to leave the party to his motion for a new trial, or an appeal.

If, however, the judge at the circuit had the power to strike out an answer or defense for insufficiency on the trial (a position I by no means admit), it would nevertheless rest in discretion, and would not be the subject of review. It would be discretionary, because the application was made at the circuit. The judge might with great propriety say to the counsel, that having omitted to demur, he must try the issue and seek his redress by some appropriate proceeding after verdict.

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The exception to the admission of the defendant's evidence that he believed the vendor's statement that he had purchased of Ellwood, does not present any question as to the validity of the sale.

The objection to the evidence was that it was improper and immaterial, and was for the jury to pass upon from the terms of the contract and the conversation that took place. No suggestion was made as to the effect of it upon the validity of the contract. If the counsel designed to present such a question, he most effectually kept it from the attention of the court.

But the plaintiff has presented the question as to the competency of the evidence objected to.

I think it was competent, assuming the defense admissible (which we must do, in the absence of any legal exception to it); the effect of the representation upon the mind of the defendant was one which the jury must pass upon; and, in order to find the sale void, must find on it in favor of the defendant. It was a material fact to be proved; the defendant was a competent witness, and was, therefore, competent to prove it.

The oath of the defendant was by no means conclusive on the jury. They were bound to inquire, 1st. Whether the representation was made by the plaintiff; 2d. Whether it was such an one as would be calculated to impose upon a prudent, careful man; 3d. Whether it was in regard to a matter material to the defendant to know; and, 4th. Whether he believed it or was imposed upon by it. If the defendant should fail in establishing either of these propositions he would fail in his defense.

Under the former practice, when parties could not be witnesses in their own behalf, the jury had to draw their conclusions, as to the effect of the representation, from the materiality of the representation and the effect such a representation would naturally have on the mind of a prudent business man. It was an inference from all the facts. It was an issuable fact, and to be proved in the same way as

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other facts in the case. The defendant's admission, whether as a witness or out of court and not under oath, that he did not rely on the representation, would have been conclusive evidence against him; and I know of no reason why, when he is a witness, he may not testify that he did rely on the representation made to him by the purchaser. If he was too credulous, putting faith in a story in itself incredible, or without using that care and caution against imposition that it becomes every prudent man to exercise in dealing with another, he must suffer the consequences of his credulity. Because he may testify that he relied on the representation, will not entitle him to a verdict annulling the sale, unless the circumstances justified his trust.

But if the question was properly before us, whether the representation proved was such an one as being found to have been made, to have been relied upon and to have been untrue, authorized the court and jury to annul the sale, I am of the opinion that the sale was void, and the judgment should be affirmed.

Courts of law and equity are governed by the same principles in giving relief in cases of fraudulent misrepresentation. The only difference between them is that a court of equity will sometimes refuse to enforce specific performance of a contract, when a court of law might give damages for a breach of it. Story, in his equity jurisprudence, § 191, thus states the principles that guide a court of equity in giving relief in case of fraudulent representation: "If a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false. To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation, but that it is matter of substance, or important to the interests of the other party, and that it actually does mislead him. For if the misrepresentation was of a trifling or immaterial thing, or if the other party did not trust to it, or was not misled by it, or

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if it was vague and inconclusive in its own nature, or if it was upon matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other; in these and the like cases there is no reason for a court of equity to interfere to grant relief on the ground of fraud."

While courts have endeavored to compel parties to observe the most perfect good faith in their dealings, they have not gone the length of holding that every false statement made by one to the other in reference to the quality, condition or value of the property, annuls the contract. Some allowance has been made for the propensity men have to extol the quality, condition or value of that which they propose to sell, and to depreciate that which they desire to buy. Hence statements as to the value of property, its freedom from defects which he knows to exist, and which might by the exercise of reasonable diligence be discovered, do not if false vitiate the contract. These are matters in regard to which neither is supposed to trust the other, but each is bound to exercise his own senses and judgment in arriving at their value and condition. (*Chitty on contracts*, 681, 682, and notes; *Sandford v. Handy*, 23 Wend. 260; *Starr v. Bennett*, 5 Hill, 303; *Haight v. Hayt*, 19 New York, 464.)

But if the person selling shall use any artifice to mislead the other and to prevent him from taking the necessary steps to inform himself, as to those matters in regard to which he is bound to exercise his own judgment, the contract will be held void, or a recovery had against him for the damages sustained by the person injured. (*Hill v. Gray*, 2 Eng. Com. Law Rep. 16; *Mathews v. Bliss*, 22 Pick. 48.)

Any representation that affects the price of an article in regard to which one party places confidence in the other, will if relied on, and is false, and the party trusting to the representation is injured, render the contract void. (*Bowring v. Stevens*, 12 Eng. C. L. 157; *Phillips v. Buck*, 1

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Vern. 227; *Taylor v. Fleet*, 1 Barb. S. C. R. 477; 1 Hilliard on Vendors, 324, 325, 339, 340; *Bench v. Sheldon*, 14 Barb. 66; *Vernon v. Keyes*, 12 East, 632—Affirmed, 4 Taunt. 488.)

Applying these principles to the case before us, it will be found that the sale of the hops in question was fraudulent and void.

The verdict establishes, 1st. The making of the representation. 2d. Its falsity. 3d. That it was relied on by the defendant. The only other element to be established to render it fraudulent was its materiality.

As I have already remarked, whatever affects the price of the property that is the subject of the contract is material.

The defendant had raised hops for several years prior to the sale in question. He was unacquainted with the market price of them. It was, therefore, due to himself to inform himself of the state of the market before entering into a contract of sale. Had he inquired of the purchaser as to the market price, and been misled by him, I am not prepared to say that the contract would not have been thereby rendered fraudulent. The inquiry was not as to the market price, however, but as to the price the purchaser was paying. The answer is not claimed to have been untrue. The defendant then inquired whether Wood had bought Ellwood's, and he was told that, if it was true he had purchased Ellwood's at twelve and one-half cents per pound, he, the defendant, would sell his at that price. It appears that Ellwood had not raised hops until that year; hence his dealing in the article was not such as to make his opinion as to the price very important. But we all know that there are men in every community whose judgment as to the value of property, or whose intelligence and shrewdness in business, give great weight to their opinions in the estimation of their neighbors, and who, if they should sell all their property at a given price, would regulate the price for the same property throughout their neighborhood. Who that deals in stocks would not be governed, as to the

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price he would pay for a particular stock, by the opinion of an intelligent broker; or, as to the value of land, by the opinion of an intelligent, careful business man, whose interest it was to inform himself as to its value?

In this case it was not Ellwood's opinion only that the defendant designed to rest upon, but upon the price actually received by him for similar property sold.

Had the defendant rested satisfied with merely inquiring whether Wood had purchased Ellwood's hops, Wood might say that he did not and could not know that the sale by E. would influence the judgment of the defendant, and that his answer, therefore, might be false, without having reason to suppose it was causing injury to the defendant. But when told by the defendant that he sold at twelve and one-half cents per pound because E. had sold at that price, he was informed that his statement was relied on, and being untrue, as he knew it was, he was cheating the defendant. A purchase thus procured ought not to stand. (*Fellows v. Gwyder*, 1 Simons, 63.)

It is said that the defendant ought not to have trusted to Wood's statement; that he had the opportunity to inquire and should have informed himself as well as to the market price as to whether E. had sold at twelve and one-half cents per pound.

The defendant, several times during the interview, proposed to Wood to wait until he could inform himself as to the price of hops. But Wood refused to wait—insisted on an immediate answer, and told the defendant that the price would probably fall as it had done some years before. The defendant was under no obligation to sell that day, but he was anxious to get the highest price for his property, and he took the only means he could, and make an immediate sale, to inform himself as to the market value of the property.

I do not doubt but that a vendor of property may put upon the purchaser the responsibility of informing him correctly as to the market value, or any other fact known

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to him, affecting the market price of the property, and if the purchaser answers untruly, the purchase will be void by reason of the fraud. The purchaser is not bound to answer in such a case; but if he does he is bound to speak the truth.

It is said by the appellant's counsel, in his points, and by Justice POTTER, in his dissenting opinion in the case, that the defendant has not sustained any damage, because he was paid the market value of hops at the time the sale was made.

The evidence of the first witness was that the price of hops, about the date of the contract, at Fort Plain, the place of delivery, was twelve to twelve and one-half cents per pound. But, he adds, hops were sold, as he understood, at twenty-eight cents at Fort Plain. He had heard that some were purchased for twenty-eight cents, but did not know the quality. The evidence as to the price being twenty-eight cents was not competent, but it was not objected to, and the jury had the right to take it, and give it such weight as they deemed it entitled to.

If the jury were bound to act upon the legal evidence of value only, then it would follow that the defendant received for his hops the fair market price at the time of the sale, and he would have no right to complain. But the other evidence being in without objection, or any intimation to the jury that they might not act upon the hearsay of the witness as evidence of the market value, I think the jury had the right to find that the defendant was induced by the misrepresentation to sell for less than the market price.

In any view of the case I think the judgment was right and ought to be affirmed with costs.

HOGEBROOM, J. I assent, after some hesitation to the affirmance of the judgment in this case, but not without some misgivings as to the soundness of the legal propositions involved in such affirmance. As a general principle, the false affirmation which should be permitted to operate

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as the foundation of a cause of action or of a defense, should relate to a fact, and not to a mere opinion; and to a fact directly bearing upon the subject matter of the contract, and not to one merely collateral and incidental thereto. As applied to the present case, there was no false statement in regard to the existing value or market price of hops, or as to the price that the buyer or speculator was paying therefor; but there was a false statement—for so we must assume after a verdict of the jury in favor of the defendant—in regard to the fact that Wood had purchased the hops of Ellwood, a neighbor of the defendant. Ordinarily, such a fact could not be supposed likely to have any legal or perceptible bearing upon the negotiations of other parties; and yet, if we assume that Ellwood had experience in the cultivation of hops, and judgment and skill as to their probable rise or fall in market, and that the defendant had not; if we assume, further, that Countryman had confidence in the skill, judgment and experience of Ellwood, more than in his own, and would be likely to be governed by them in making a contract for himself; if we assume, further, that the article of hops was then as yet in a growing and immature state, and had not yet attained a fixed or determinate value in the market; and that its value, at the future period, when the hops would be ripe and cured and ready for delivery, would be subject to much fluctuation from ordinary circumstances, such as the influence of the weather upon the crops, the demand for the article, and the condition of the money market; if we assume, further, that the proposed buyer was aware of the reliance which the defendant placed upon the skill, judgment and experience of Ellwood, and of the influence they were likely to have upon the mind of the defendant in inducing a sale of his hops, or the contrary; and that Wood, with such knowledge, falsely and fraudulently represented that Ellwood had sold him his hops, with the view of entrapping the defendant into a sale of his crop—all of which assumptions, I think, we are warranted to

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make from the verdict of the jury upon the facts of the case as presented in the testimony—I am inclined to think we are justified in concluding that, under the peculiar aspects of this case, the false representation of Wood was to a fact material to the contract, inasmuch as it had a vital bearing and influence upon the mind of the defendant in inducing him to enter into it. Considered in that light, I am on the whole inclined, though contrary to my first impressions, to regard the defense to the action as well founded in law and the judgment capable of being supported; but I do not wish to be regarded as extending the general principle beyond the just bearing of facts kindred to those which are presented in the present case.

With this explanation I assent to the *affirmance* of the judgment of the supreme court.

DENIO, Ch. J. and SELDEN, J., were also for affirmance; the latter on the ground stated by DAVIES, J., but expressing no opinion on the question of practice. WRIGHT, JOHNSON and INGRAHAM, JJ., were for reversal.

Judgment affirmed.

INDEX.

A

ACCOUNT STATED.

See USURY, 1, 2, 4.

ACTION.

See ASSIGNOR AND ASSIGNEE—EXECUTION, 3 ; INSURANCE (FIRE), 9, 10, 11 ; NEGLIGENCE, 1, 2 ; PRINCIPAL AND AGENT ; WATER, 1, 4, 5.

AGREEMENT.

1. By a verbal agreement between S. and F., it was agreed that S. should subscribe for \$1,000 of the capital stock of a manufacturing corporation, one-half of which should belong to each ; that S. should hold the same on joint account and receive the dividends thereon, F. to pay the interest annually on \$500, one-half the amount paid ; that when S. should want the \$500 he was to notify F. ; and if F. did not pay, S. should sell the stock, and F. would pay the difference between the sum received on such sale and the par value of the stock. S. accordingly subscribed for \$1,000 of the stock, in his own name, and paid therefor. It was a part of the bargain that the agreement should be put in writing, but it never was. A few years later the company became insolvent, and the stockholders being called on to pay an amount of debts equal to the stock held by them, S. paid \$1,000. *Held*, 1. That the company having become insolvent, and its stock worthless, S. was not bound to sell it ; and F. was clearly liable for one-half the price paid for the stock. 2. That S., being the nominal owner of the whole stock, was liable to pay \$1,000 in satisfaction of the debts of the company, and was not bound to wait until he was sued, and judgment recovered, before he paid ; and that having paid

AGREEMENT—*Continued.*

\$500 on that account, which F. was equitably bound to pay, he could recover it back from F. 3. That the statutory exemption of executors, guardians and others, trustees of an express trust, from liability for the debts of a corporation in which they hold stock in their fiduciary capacity, does not reach such a case. 4. That although F. might have insisted on the performance of the condition that the agreement should be reduced to writing, it was competent for him to waive it, by recognizing his liability on the contract, although it had never been reduced to writing and signed. 5. That F.'s liability for the \$500 paid by S. on account of debts, did not accrue until the stock was paid by S.; and that the statute of limitations did not begin to run until such payment was made. *Stover v. Flack*, 64.

2. Where the holder of a mortgage which was past due, being about to enforce it by action, H. agreed by parol with the plaintiff's testator, who had assumed the payment thereof, for a valuable consideration, to purchase said mortgage and refrain from collecting the principal for five years. *Held*, that this agreement, being executed by the taking of an assignment of the mortgage, and the payment of the consideration therefor, operated as effectually to extend the time of payment, as if it had been under seal. *Dodge v. Crandall*, 294.
 3. *Held, also*, that this was an executory and not an executed contract, and was, therefore, not affected by the statute of frauds. *Id.*
 4. *Held, further*, that a judgment dismissing the complaint, in an action to foreclose the mortgage, brought before the expiration of the five years, was sustainable upon the equitable ground that the defendant, having a cause of action, could be allowed to set it up to avoid circuity of action. *Id.*
- See TRUSTS; VENDOR AND PURCHASER, 3-15; WORK AND LABOR, 2.

AMENDMENT.

1. Several individuals, composing the firm of R., F. & Co., were sued by the plaintiff by their firm name, the complaint alleging that the names of the individual members of said firm were unknown to the plaintiff. F. only, appeared and answered, in the first instance, claiming the goods sued for in behalf of the firm. He also put in a supplemental answer, in which he claimed judgment in his own favor for

AMENDMENT—Continued.

the value of the goods, and not in favor of himself and his copartners individually. After judgment, the defendants were allowed to amend by entering an appearance *nunc pro tunc* for the other two partners, and to amend the supplemental answer, so as to make it a claim in behalf of all the members of the firm individually, with a demand for judgment in their favor. *Held*, that there was nothing for which the judgment should be reversed, in the fact that it was rendered for the value of the goods, in favor of the several individuals composing the firm of R. F. & Co. *Thompson v. Kessell*, 383.

2. *Held*, also, that the supreme court had ample power to make the amendments which were ordered, by inserting the individual names of the other members of the firm in the answer and in the judgment, in accordance with the facts found on the trial. *Id.*
3. *Held*, further, that such amendments were clearly in furtherance of justice; but if otherwise, that the order of the supreme court, allowing them, was not open to review in this court. *Id.*

ANSWER.

See PRACTICE.

APPEAL.

1. An order of the supreme court, setting aside a verdict as being against the weight of evidence, and on payment of costs, is not reviewable on appeal, by this court. *Young v. Davis*, 134.
2. It is the invariable practice of this court not to review orders made by the supreme court, granting new trials, on the ground that the verdict was either against evidence or against the weight of evidence. *Id.*

ARREST.

1. A defendant may be legally arrested on a *ca. sa.* issued after judgment in a cause in which an order of arrest has been obtained and an arrest made before judgment, and which order has not been vacated before the arrest on the *ca. sa.* *Smith v. Knapp*, 581.
2. But where the order of arrest was obtained upon one only of five causes of action stated in the complaint, the first, and the judgment was not finally recovered on that, but upon

ARREST—Continued.

the fifth cause of action, for which the defendant was not liable to arrest, under the provisions of the code of procedure; and the defendant having been arrested on a *ca. sa* issued after judgment, and imprisoned thereon; *Held* that his remedy was to move to be discharged from imprisonment, and that, not having done so, his imprisonment was regular. *Id.*

3. A delay of more than three months in issuing a *ca. sa.*, where the defendant, at the time of rendering a judgment against him, is in custody upon process issued in the cause, will entitle him to a supersedeas. *Id.*
4. The defendant's remedy, in such a case, is to apply to a judge for a supersedeas on the ground that he was not charged in execution within the time limited by statute, or by motion to the court. If he does neither, the imprisonment will be regular, and the sheriff liable on the escape of the prisoner, either as bail or in action for the escape. *Id.*
5. The plaintiff has an election which of these remedies he will adopt, and that election is manifested by the complaint. *Id.*
6. If he proceeds against the sheriff as bail, he must set forth the proceedings to and including the escape, and allege that the defendant is bail, and the complaint must demand the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendant as bail should be omitted, as wholly irrelevant to the cause of action for the escape. *Id.*
7. If the complaint makes no mention of the defendant as bail, and there is nothing in it manifesting an intention or election to hold him liable in that character, it is to be treated as an action for an escape, and the limitation of one year for bringing an action, prescribed by § 94 of the code of procedure, applies. *Id.*
8. It is competent for a defendant, after the entry of judgment, to move to set aside the order of arrest, upon showing to the court that the judgment was recovered on a cause of action for which he was not liable to arrest, and hence that he cannot be legally imprisoned on a *ca. sa.* issued on such judgment. But if he suffers the order of arrest to remain in force, it must be held to be regular, for the purposes of an action for an escape from imprisonment on the *ca. sa.* *Id.*

ASSIGNMENT.

1. In equity, a parol assignment of a claim or demand enables the assignee to sue in his own name. *Hooker v. Eagle Bank of Rochester*, 83.
2. Under the code an assignment, valid as an equitable assignment, is equally valid at law. *Id.*

FOR THE BENEFIT OF CREDITORS. See DEBTOR AND CREDITOR.

OF A LEASE. See LANDLORD AND TENANT, 2, 3, 6.

ASSIGNOR AND ASSIGNEE.

A right of action against a common carrier to recover the value of property entrusted to him, is assignable; and the assignee may sue in his own name. *Merrill v. Grinnell*, 594.
See LANDLORD AND TENANT, 1, 2, 3, 5, 6, 14; USURY, 2, 4.

ATTACHMENT.

See EXECUTION, 4.

B.

BAGGAGE.

See COMMON CARRIERS, 10-16.

BAIL.

See ARREST, 4, 5, 6, 7.

BANK NOTES.

See CONTRIBUTION, 2, 4, 5.

BANKS AND BANKING.

1. The plaintiff, a director in a bank, who had been such from its organization, who usually attended the meetings, and was actually present and took part in the proceedings of the board of directors when the last dividend was declared, having purchased from the cashier of the institution twenty shares of the capital stock, brought an action to have such contract rescinded, and to recover back the money paid, on the ground of false representations and concealments of the cashier, as to the value of the stock and the condition of the bank, at the time of the purchase: *Held*, that the plaintiff was not estopped from setting up his actual ignorance of the condition of the bank at the time of the sale. *Lefever v. Lefever*, 27.

BANKS AND BANKING—*Continued.*

2. That although the purchaser was a director of the bank, having the means of knowledge, he was not, in the particular transaction, chargeable with notice of the condition of the bank. *Id.*
3. That if he was *actually ignorant* of its condition, the fraudulent vendor would be equally responsible to him for the deceit as to any stranger to the institution. *Id.*
4. That it was not a case in which the plaintiff was legally bound to know the truth or falsity of the vendor's representations. *Id.*
5. *Held, also*, that the evidence in such action plainly showing that at the time of the alleged sale and transfer of the stock, on the 29th of August, 1857, the bank was, by the application of all the *ordinary* tests, sound, solvent and prosperous, and the stock worth all that the defendant had represented it to be, the plaintiff could not be allowed to show the contrary by introducing in evidence what purported to be a certified copy of proceedings had in November, 1857, on the petition of certain stockholders, for the re-establishment of the bank. *Id.*

BOOKS OF ACCOUNT.

See EVIDENCE, 7-10.

BREACH OF PROMISE OF MARRIAGE.

1. Where it was proved, in an action to recover damages for a breach of promise of marriage, that the uncle and aunt of the plaintiff, in her presence, and without objection on her part, asked the defendant to marry her, which he refused, and when the plaintiff said to the defendant: "M., I don't want your money; I want your word and honor that you promised me," he replied: "There is no use in talking; I can't marry you now." *Held*, that there was evidence enough, on the subject of a request, to submit that question to the jury. *Kniffen v. McConnell*, 285.
2. In an action for breach of promise of marriage, evidence as to the defendant's pecuniary circumstances should be confined to general reputation. To that extent it is admissible. *Id.*
3. Where the answer, in such an action, contains only a denial of the promise, evidence showing acts of improper and lewd conduct on the part of the plaintiff, for the purpose of proving criminal intercourse with other men, after the making

BREACH OF PROMISE OF MARRIAGE—Continued.

- of the promise, is not admissible, as a bar to the action, for the reason that that defense is not set up in the answer. *Id.*
4. Such evidence may be received, however, in mitigation of damages, *it seems. Id.*
 5. It is not erroneous for the judge to charge the jury that if they find the defendant seduced the plaintiff under a promise of marriage it aggravates the damages. *Id.*
 6. Where the plaintiff proved: 1st. The promise, as admitted by the defendant in his acts and conversation. 2d. The pregnancy of the plaintiff, and subsequent birth of a child. 3d. The application to the defendant to marry her, on account of her condition, and his refusal. 4th. The appeal of the plaintiff to him that she did not want his money, but wanted his word and honor that he had promised her. *Held*, that this evidence was amply sufficient to submit to the jury the question whether the defendant had seduced the plaintiff, and if so, whether he had promised marriage, to carry out his intentions, or had taken advantage of the confidence arising from that promise, to effect his purpose. *Id.*
 7. It is not erroneous to charge that if the defendant has come into court and attempted to prove the plaintiff guilty of misconduct with other men, of which he knew she was innocent, or when the misconduct was committed with himself, it aggravates the injury and strengthens the claim to damages, although such misconduct is not set up in the answer as a defense. *Id.*
 8. Where the judge charged that if the jury were satisfied that the defendant was not the father of the plaintiff's child, they should find for the defendant; *Held*, that there was some ground for criticism on this part of the charge; that the pregnancy being a conceded fact, it was not for the defendant to prove that he was not the father, but for the plaintiff to prove that he was. *Id.*

BRIDGES.

1. It is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right to

BRIDGES—*Continued.*

- do so is expressly prohibited by the first grant. *The Fort Plain Bridge Co. v. Smith*, 44.
2. Where the charter of a bridge company prohibited the erection of any other bridge within a mile of that to be erected by the grantees, and the section containing that prohibition was subsequently repealed; *Held*, that the grantees of the franchise stood in precisely the same position, in reference to a second bridge, that they would have done if no such prohibition had been contained in their charter. *Id.*
 3. Assuming that the Mohawk river is a public highway (though it is no longer navigable, except to a very limited extent), and that a bridge over it is an obstruction to navigation and therefore a public nuisance, yet no one has the right to abate it, or to maintain an action for damages occasioned by the erection thereof, unless he has himself sustained some damage not suffered by the rest of the community. *Id.*
 4. Though a bridge over a navigable stream may be a nuisance to those navigating it, it does not follow that it is a nuisance as to others who do not navigate it. *Id.*
 5. The Fort Plain Bridge Company having no exclusive grant of the right to maintain their bridge over the Mohawk river and take toll, it follows that every other bridge built over the stream, which does not impede navigation, is lawfully erected, and is not a public nuisance; and no action for damages will lie, for its erection. *Id.*
 6. If it does impede or impair navigation, it is a nuisance as to those navigating, but not as to any others. *Id.*
 7. There are three cases in which authority from the legislature is necessary to erect a bridge over a stream: 1. Where the stream is navigable. 2. Where the state owns the bed of the stream; and 3. Where the right to take toll is desired. *Id.*

C.

CERTIORARI.

1. A *certiorari* does not lie to an inferior tribunal, except to remove proceedings which remain before it. *The People ex rel. Hunting v. The Commissioners of Highways of East Hampton*, 72.
2. In order to procure a reversal of an order of commissioners of highways, ordering the removal of fences as being an

CERTIORARI—Continued.

encroachment in a highway, on *certiorari*, it is necessary that the order should be brought up and made a part of the record. *Id.*

3. The order cannot be brought up on a *certiorari* directed to the jury which determined the question as to the encroachment; they having no custody of the order, or power to make a return of it. *Id.*
4. The jury are no longer a legal body, after their verdict or finding is signed and they have separated. Hence a return, signed by one of their number, several months afterwards, is no return of the jury as a body or tribunal. *Id.*
5. In such a proceeding there is no such officer as foreman authorized to represent the panel of jurors, and to act for them. *Id.*
6. Where a *certiorari* is directed to the jurors, the commissioners of highways cannot become parties by appearing voluntarily and defending their proceedings as commissioners. *Id.*
7. The office of the writ of *certiorari* is merely to bring up the record of the proceedings, to enable the supreme court to determine whether the inferior court has proceeded within its jurisdiction, and not to correct mere errors in the course of the proceedings. *Id.*

COLLISION.

See NEGLIGENCE, 3.

COMMISSIONERS OF HIGHWAYS.

See CERTIORARI.

COMMISSIONERS OF LOANS.

1. It is extremely doubtful whether one commissioner appointed under the act of the legislature "authorizing a loan of moneys to the citizens of this State," passed April 11, 1808, can demand the principal sum due on a mortgage given to the commissioners, so as to put the mortgagor in default for non-payment, and justify a sale of the mortgaged premises. *Per* WRIGHT, J. *York v. Allen*, 104.
2. But it is very clear that a notice and sale by one commissioner only, is a nullity, and a conveyance executed by him to the purchaser at such sale a void act. *Id.*
3. In 1849 and 1850, there being but one loan commissioner under the act of 1808, in the county of Chenango, the per-

COMMISSIONERS OF LOANS—Continued.

son appointed in 1849 refusing to qualify or act, the sole commissioner proceeded to notify mortgagors that the payment of the amount due on their mortgage would be required November 1, 1849. On that day he caused a notice to be first published of a sale of the premises embraced in such mortgage on the 7th of February, 1850. This notice was signed by him as "loan commissioner," and was published once in each week for twelve weeks. On the day appointed he put the premises up at public auction, and sold the same to B., the highest bidder, and afterwards gave him a deed not in conformity with the statute, and not having the seal of office of the commissioners affixed, nor two witnesses thereto. *Held*, that the whole proceeding was a nullity; the sole commissioner having no authority either to sell or convey. *Id.*

4. It is the commissioners of loans, in their corporate capacity, that the statute provides, in case of default in payment of principal or interest, shall be seised of an absolute, indefeasible estate in the lands, &c., mortgaged to them; *they* are required to give the notices and make the sale; and *they* only, under their seal of office, can convey to the purchaser. *Id.*
5. Although the statute declares that in case of default in payment of a mortgage to loan commissioners when demanded, the commissioners shall be seised of an absolute, indefeasible estate in the lands, &c., this will not entitle them to maintain ejectment in such a case. *Id.*
- 6 Nor does the statute seem to contemplate that they are to enter into and take possession of the lands, until after a failure at public sale to obtain a bid of the amount due on the mortgage, or, having obtained such bid, there shall be an omission to pay. *Id.*

COMMON CARRIERS.

1. When a carrier is entrusted with goods for transportation, and they are injured or lost on the transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or the public enemy. And, to avail himself of such exemption, he must show that he was himself free from fault at the time. *Read v. Spaulding*, 630.

COMMON CARRIERS—Continued.

2. His act or neglect must not concur and contribute to the injury. If he departs from the line of his duty and violates his contract, and, while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected. *Id.*
3. Thus, where there was an unreasonable delay on the part of a carrier, in forwarding goods, and while they were in a railroad depot, at an intermediate point, they were wetted and injured by an extraordinary flood, caused by the damming up of the water in the channel, by ice, and setting the same back upon the freight depot; *Held*, that the goods having been exposed to the peril by the fault and neglect of the carrier, he was not excused. *Id.*
4. A common carrier, to exempt himself from liability for injuries happening to goods while he is engaged in transporting them for hire, must show that he was free from fault at the time the injury or damage occurred, and that no act or neglect of his concurred in or contributed to the injury. *Michaels v. The New York Central Railroad Company*, 564.
5. If he has departed from the line of duty, and has violated his contract, and, while thus in fault, and in consequence of that fault, the goods are injured, by an act of God, which would not otherwise have produced the injury, then the carrier is not protected. *Id.*
6. When goods are delivered to a railroad company, by a connecting railroad company, to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to send them off immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods. *Id.*
7. The defendant, a common carrier, received at Albany, from the Hudson River Railroad Company, a box of goods to be transported to Rochester and delivered to the owners, for hire. Instead of forwarding the box immediately, it detained the same in its freight house at Albany, to await the rendering of a bill for back charges, by the Hudson River Railroad Company. While so detained, the goods were injured by being wetted by an unusual and extraordinary rise in the waters of the Hudson river. *Held*, that the detention of the

COMMON CARRIERS—*Continued.*

- goods was negligence on the part of the defendant; and that such negligence having concurred in and contributed to the injury to the goods, the defendant was precluded from claiming the exemption from liability which the law would otherwise extend to it. *Id.*
8. *Held, also*, in an action brought by the owners of the goods against the carrier, to recover for the damage done to the goods, that the judge, on the trial, properly refused to direct a verdict for the defendant on the ground that the injury complained of was caused by the act of God, and without any fault or negligence on the part of the defendant; or because the goods were in the possession of the defendant at the time, in the character of a warehouse-man, and not as a common carrier. *Id.*
 9. *Held, further*, that the judge properly instructed the jury that, under the evidence, the defendant was liable as a common carrier for the damages sustained by the plaintiffs; and that the only question to be considered was the amount of damages. *Id.*
 10. The baggage of a passenger, entrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked, is under the same protection as the goods which are entrusted to a common carrier of goods. *Merrill v. Grinnell*, 594.
 11. A proper sum of money, for traveling expenses, contained in the trunk of a passenger, is to be considered as a part of his personal baggage, and may be recovered for, as such. *Id.*
 12. The amount must be measured not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey; and includes such an allowance for accidents or sickness, and for sojourning by the way, as a reasonably prudent man would consider it necessary to make. *Id.*
 13. Whether the amount claimed, in the case of a loss, is reasonable or excessive in a particular instance, must depend upon the character of the journey and the special circumstances of the case. *Id.*
 14. It should be limited to money taken for traveling expenses properly so called. *Id.*
 15. The question as to the reasonableness of the amount of money carried by a passenger in his trunk, for his traveling

COMMON CARRIERS—Continued.

- expenses, is one to be determined by the jury, or by a referee; and if it has been passed upon by a referee, in a given case, his decision should not be disturbed. *Id.*
16. The liability of a carrier, for the baggage of a passenger, is the same as for freight. He is liable as insurer for both. *Id.*

COMPARISON OF HANDS.

See EVIDENCE, 5.

COMPLAINT.

See RAILROAD COMPANIES, 8.

CONDITION.

See INSURANCE (FIRE), 9, 10, 11, 12.

CONSIDERATION.

See ORDER FOR THE DELIVERY OF GOODS, 10, 11; PRINCIPAL AND SURETY, 1, 2, 4.

CONTRIBUTION.

1. Goods carried on deck, according to the custom of the trade by steamboats navigating Long Island Sound, and stowed in the usual way, are liable to contribution by way of general average for a loss occasioned by a jettison of other goods necessarily thrown overboard under stress of weather and while subjected to the perils of the sea. *Harris v. Moody*, 266.
2. Bank bills of individuals, so carried for them, in a crate, by an express company, which company, by agreement with the owners of the steamboat, pay such owners a fixed sum annually for the carrying of a stated number of portable crates, with the contents thereof, are bound, when saved, to contribute for such a loss. *Id.*
3. All property on board the vessel at the time of the jettison, and saved, unless attached to the persons of the passengers, is to be brought into contribution. *Id.*
4. Bank bills are to be regarded as property, the goods and chattels of the owner thereof; and in case of loss, the owner is entitled to recover the nominal or par value thereof, in the absence of any proof of depreciation, with the interest thereon. *Id.*
5. Bank notes transported by an express company, for the owners, under such an arrangement between it and the owners of the vessel, as is above stated, are to be deemed, as paying freight, and therefore as forming a part of the cargo of the vessel. *Id.*

CORPORATION.

1. It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment. *Hooker v. Eagle Bank of Rochester*, 83.
2. For many purposes the officers and agents of the corporation may employ persons to perform services for it; and such employment, being within the scope of the agent or officer's duty, binds the corporation. *Id.*
3. In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors and they receive the benefit of such service, without objection, the corporation is liable upon an implied assumpsit. *Id.*

COUNTER-CLAIM.

A claim on the part of a defendant, for the price and value of the identical goods which are the subject of the action, is a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is at least connected with the subject of the action, and is strictly a counter-claim, within section 150 of the code of procedure. *Thomson v. Kessel*, 383.

COVENANT.

1. The defendant, J. C., covenanted, upon the plaintiff's agreeing to give an extension of credit to B. C., on his executing a mortgage for \$4,000, that "if the title of the said B. C. is good (which said J. does not warrant), the same (i. e., the farm) shall bring on foreclosure sufficient, after payment of" certain prior mortgages, "to satisfy the said mortgage" to the plaintiff, &c. *Held*, this was an absolute covenant that on a foreclosure the premises should bring enough to pay the plaintiff's mortgage "if the title of B. C. is good." *The President, &c., of the Mahaiwe Bank v. Culver*, 313.
2. And that the covenant meant what was literally expressed, viz: that the farm should bring enough, on foreclosure, to pay the plaintiff's mortgage, if the mortgagor's title was good, i. e., not in fact legally defective. *Id.*
3. And it being neither averred nor proved that B. C.'s title to the premises mortgaged to the plaintiff was defective within the intent and meaning of the defendant's covenant, it was *held* that the existence of an adverse claim to the farm, and

COVENANT—*Continued.*

the pendency of a suit respecting it, at the time of foreclosing a prior mortgage, did not establish a defect in the title, or constitute any defense to an action on the covenant. *Id.*

D.

DAM.

See WATER, 1, 8, 9.

DAMAGES.

The plaintiff, claiming to be the owner of certain timber lying on the defendants' land, sued the latter, who also claimed to own the property, to establish his title. He procured a preliminary injunction, forbidding the defendants to assert their alleged ownership by suit in court, or in any other way, pending the principal suit. He failed in that suit, the court determining that the property belonged to the defendants, and not to the plaintiff. In the meantime the plaintiff carried off the timber, destroyed its identity, and disposed of and converted the proceeds to his own use. *Held*, that the measure of the damages which the defendants in the suit were entitled to recover, in an action upon the injunction bond, was *prima facie*, the value of the property in question. *Benton v. Fisk*, 166.

See WATER, 1, 4, 5, 7.

DEBTOR AND CREDITOR.

ASSIGNMENTS IN TRUST FOR THE BENEFIT OF CREDITORS.

1. A provision, in an assignment of property in trust for the benefit of creditors, directing the payment of debts and liabilities due, or *to grow due*, if intended to secure debts or claims not then in existence, but which are afterwards to be created, either by the assignor or the assignees, would be void. *Brainerd v. Dunning*, 211.
2. But a clause directing the payment of debts, bonds, notes, bills and sums of money due and to grow due, is not subject to such a construction. It applies only to claims then in existence. Whether due or to grow due, is immaterial. *Id.*
3. A clause providing for the payment of all debts, &c., due to the assignees from the assignor, "or for which he is liable, or may become liable to them, including notes, bills and drafts indorsed and guaranteed by them," &c., refers to

DEBTOR AND CREDITOR—*Continued.*

such notes, &c., on which the assignees are indorsers or guarantors, and on which the liability has not yet been fixed by protest—claims which they may pay, or become liable to pay, by reason of indorsements or other responsibilities which they may have already made or incurred for the assignor. *Id.*

4. A direction for the payment of all debts, demands and sums of money for or upon which, or on account of which the assignees, or either of them, have become or may be rendered liable, for or on account of the assignor, applies only to past debts, and not to new ones to be created, and vests no discretion in the assignees. It only secures debts which have been assumed, or on which the assignees may be rendered liable. *Id.*
5. The authority of each of several partners, as agent of the firm, is necessarily limited to transactions within the scope and object of the partnership, and in the course of its trade or affairs. *Wells v. March*, 344.
6. A general assignment to a trustee, of all the funds and effects of the partnership, for the benefit of creditors, is the exercise of a power without the scope of the partnership enterprise, and amounts, of itself, to a suspension or dissolution of the partnership. *Id.*
7. No such authority as that, in one of several partners, can be implied from the partnership relation. *Id.*
8. And if one partner executes such an assignment, without the consent or authority of the rest, it will be void, and will not operate to pass to the assignee the title to the firm property. *Id.*
9. But where N., who had been the active partner in a firm, absconded, leaving it largely insolvent, first writing a letter to C., his partner, in which he declared that he could not manage the debts of the firm; that he would be far out to sea before C. could receive the letter; that he was going to California, where he would start again in business with \$2,100 of the funds of the firm, which he had taken with him; adding: "I hereby assign you my interest in the business of N. & Co.," &c.; also, "Take charge of everything in our business; close it up speedily," &c.; *Held* that this, under the circumstances, was a full assent on the part of N., and an authorization to C. to execute an assignment of the partnership property, and rendered an assignment

DEBTOR AND CREDITOR—*Continued.*

executed by C. a valid and operative instrument, as against him, N. *Id.*

DEED.

See TRUSTS.

DEVISE.

1. By the true construction of the provision of the Revised Statutes to prevent lapses in devises in certain cases (part 2, chap. 6, title 1, article 3, § 52), the word *descendant*, wherever occurring, is limited to issue in any degree of the person referred to, and does not embrace collateral relations. *Van Beuren v. Dash*, 393.
2. Accordingly, where a testatrix devised separate aliquot shares of her real estate to two sisters and to certain nephews and nieces, several of whom died in her lifetime, some leaving children, and others without issue; *held*, that the shares of all those devisees so dying before her lapsed, and that such shares descended to her heirs-at-law. *Id.*
3. *Held*, also, that the circumstance that three-fifth parts of the whole estate devised had lapsed under the foregoing rule, did not authorize the court to declare the whole will void. *Id.*

E.

ESCAPE.

If, in an action for an escape, it is shown that the debtor was totally insolvent, the plaintiff is not entitled to recover of the sheriff the whole amount of the judgment. *Smith v. Knapp*, 581.

See ARREST, 4, 7, 8.

ESTOPPEL.

1. It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled, another acting upon it in good faith, and exercising reasonable care and diligence under all the circumstances, that is enough. *The Manufacturers' and Traders' Bank v. Hazard*, 226.
2. Where a prior incumbrancer by judgment, on being made a party to a foreclosure suit, under an allegation in the complaint, charging him as having an interest in the premises

DEBTOR AND CREDITOR—*Continued.*

such notes, &c., on which the assignees are indorsers or guarantors, and on which the liability has not yet been fixed by protest—claims which they may pay, or become liable to pay, by reason of indorsements or other responsibilities which they may have already made or incurred for the assignor. *Id.*

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2. Where a prior incumbrancer by judgment, on being made a party to a foreclosure suit, under an allegation in the complaint, charging him as having an interest in the premises

ESTOPPEL—Continued.

subsequent to the mortgage, makes no defense to the foreclosure, but allows judgment to be taken against him by default, and the surplus moneys to be distributed to other claimants, this is not equivalent to an admission by him upon the record, that he has no lien upon the premises older than, or superior to that of the mortgage, so as to be an absolute *estoppel* upon him (or a purchaser under his judgment), in another action brought by a different plaintiff for the foreclosure of a distinct and prior mortgage, and prevent him from asserting in the latter suit a legal priority to the surplus moneys to which he is apparently entitled by virtue of his judgment; the parties to the record not being the same, nor the subject of controversy identical. *Frost v. Koon*, 428.

3. Nor will such incumbrancer (or his assignee), be estopped from claiming the surplus moneys in the second foreclosure suit, by his standing by at the sale in that suit, and suffering the property to be sold to another person, under a public announcement by the sheriff, that there are no other liens upon the premises than those stated (among which that of the judgment under which such incumbrancer claims is not included); where the purchaser is fully apprised of such incumbrancer's rights, and that they will be insisted on. *Id.*
4. Where, in an action to recover damages for setting water back upon the plaintiffs' land, the plaintiffs to prevent the defendants from alleging title to the premises, showed that the defendants' ancestor, under whom they claimed, was present when one of the plaintiffs purchased the premises, and that he did not claim that he owned the land, but said he had come to buy it; *Held* that this, although very loose evidence on which to rest an *estoppel*, was some evidence, and sufficient, had it been submitted to the jury, to support a verdict finding the *estoppel*. *Brown v. Bowen*, 519.
5. Where the judge charged the jury that the defendants were estopped from setting up and relying upon their title to the premises as a defense to the action; *Held* that under this charge the jury were not at liberty to consider the question of *estoppel* as a question of fact, but were bound to consider the case on the assumption that as matter of law the defendants were estopped from asserting title to the premises; and that in this respect the court erred in its charge. *Id.*

ESTOPPEL—Continued.

6. That the question belonged to the jury, and should have been submitted to them as a question of fact. *Id.*
 7. Facts necessary to establish an estoppel *in pais*. *Id.*
 8. In the absence of proof of the effect of the admission on the party setting up the estoppel, it is for the jury to say whether, on the facts, the several essential parts of the estoppel are proved. *Id.*
 9. Where, in an action to recover damages of the defendants for flooding the water back upon mills in the occupation of the plaintiffs, by means of a dam, it was shown that the defendants and their ancestor had omitted to assert title to the premises in question, although knowing the premises to belong to them, and that the plaintiffs had purchased them, and were making valuable permanent improvements thereon in the belief that they owned them; *Held* that this silence—this omission to assert title—clearly constituted an estoppel, and that no evidence could do away with the force of it. *Id.*
- See **BANKS AND BANKING**, 1; **INSURANCE (FIRE)**, 10, 11; **WATER**, 9.

EVIDENCE.

1. A promissory note, set up as a counter-claim, was alleged by the plaintiff to be a forgery. A witness who was cashier of a bank, after testifying that he was acquainted with the handwriting of the alleged maker, and that the signature to the note was in his handwriting, was asked whether the body of the note and the signature were written with the same ink. *Held*, that the question was proper; the circumstances connected with the inception of the note, and the defendant's possession of it, being legitimate subjects of investigation; and that the answer of the witness, in the negative, laid a just foundation for subsequent inquiries tending to satisfy the jury of the fraudulent character of the note. *Dubois v. Baker*, 355.
2. *Held*, also, that other questions referring to facts apparent and obvious upon an inspection of the note, as: whether there were erasures upon it? whether they were made before or after the note was written? and whether the edges of the note were cut edges or the ordinary edges of foolscap paper? were not objectionable as calling for *opinion*. That the answers to them elicited *facts*, and facts material to the pending investigation, and having a tendency to make out the plaintiff's theory respecting the note. *Id.*

EVIDENCE—*Continued.*

3. That as to the writing upon the erasure, or whether made before or after the body of the note was written, if that rested in opinion, it was a proper inquiry to make of the witness, who was a bank cashier, and was therefore qualified to speak as an *expert*. *Id.*
 4. *Held, further*, that questions put to the same witness, having for their object to elicit testimony tending to show that the note was written over the signature of the maker, and after the signature was written, were proper; and that his answer, that the note was more crowded and the words more cramped and confined than the maker's usual writing, formed an important link in the plaintiff's theory that the note was in fact written after the signature. *Id.*
 5. *Held, also*, that a comparison of the handwriting of the note in controversy with other writings of the alleged maker, in evidence in the cause, was allowable, for the purpose of ascertaining the genuineness of the note. *Id.*
 6. In an action to recover damages for a personal injury, there is no valid objection to the exhibition of the injured limb by the plaintiff, to the surgeon called to describe the injury, before the jury. *Mulhado v. The Brooklyn City Railroad Company*, 370.
 7. After a defendant has availed himself of the plaintiff's books of account, to establish certain credits in his favor, it is competent for the plaintiff to read from the same books charges and entries which show that those credits have been exhausted by counter charges of debit, made at about the same time and afterwards. *Dewey v. Hotchkiss*, 497.
 8. The defendant cannot use the books to establish credits in his favor, and *uno flatu* deny to the plaintiff the full benefit of the charges therein against him. *Id.*
 9. He must take the whole or none; and having elected to put the books in evidence, for his own benefit, he cannot afterwards be permitted to deprive the plaintiff of the benefit of any charges therein in his favor. *Id.*
 10. In such a case it is wholly unimportant whether the whole or any portion of the entries are in the handwriting of the plaintiff. *Id.*
- See BANKS AND BANKING, 5; BREACH OF PROMISE OF MARRIAGE, 1, 2, 3, 4, 6; ESTOPPEL, 4; INSURANCE (FIRE), 3, 4, 6, 7; MALICIOUS PROSECUTION; PRINCIPAL AND SURETY, 3, 4; VENDOR AND PURCHASER, 5, 9, 10, 11

EXCEPTIONS.

See PRACTICE, 5.

EXECUTION.

1. The party in whose favor process issues, may give such directions to the sheriff as will not only excuse him from his general duty, but bind him to the performance of what is required of him. *Root v. Wagner*, 9.
2. Where a judgment is recovered against several defendants, and execution issued against all, the plaintiff in the judgment, or the assignee thereof, may direct the amount thereof, or any thing less than the whole amount, to be made out of the property of any or either of the defendants. *Id.*
3. Where a judgment was recovered against four defendants, C., K., S. and T., and an execution issued thereon was levied upon the property of C., K. and S., whereupon the holder of the judgment directed the sheriff to let the sale of K.'s property, which was advertised for sale, go down, but to hold on to the levy as to the property of C. and S., and to make two-thirds of the judgment out of the property so levied on, of C. and S., which order and direction the sheriff refused to obey: *Held*, that the sheriff was liable to the holder of the judgment for two-thirds of the amount thereof, upon the assumption that the property of C. and S., which he had levied on, was sufficient to make that amount. *Id.*
4. D. and S., the plaintiffs in an attachment suit, issued an execution therein, without any directions to the sheriff not to levy on any particular property; and were afterwards informed that the sheriff had levied on certain lumber claimed by B. and W. as assignees of the judgment debtor, and that a suit was threatened by B. and W. The attorney of D. and S. refused to give the sheriff directions not to sell the lumber. D. and S. knew the lumber was advertised for sale under the execution, and they afterwards received the proceeds of the sale, in payment of their execution. *Held*, that these facts would have been, on a trial before a jury, sufficient to submit to them the question whether D. and S. had not by their acts, ratified the taking of the goods by the sheriff, and the subsequent sale of them to pay their claim. *Brainerd v. Dunning*, 211.
5. *Held*, also that D. and S. having, with full knowledge of all the facts, and without objection, received the proceeds of the lumber and applied them to their own use, this amounted

EXECUTION—Continued.

to a ratification of the levy made by the sheriff, and made them liable to the real owner, for the property so sold. *Id.*

EXECUTORS AND ADMINISTRATORS.

See JUDGMENT.

EXPRESS COMPANIES.

See CONTRIBUTION, 2.

F.**FALSE REPRESENTATIONS.**

See BANKS AND BANKING, 1; VENDOR AND PURCHASER, 14 to 18.

FORECLOSURE SUIT.

1. Where foreclosure proceedings are entirely regular, and free from fraud, they cannot be disturbed, or set aside, without some legal reason. *McCotter v. Jay*, 80.
2. Want of knowledge of the time and place of sale, on the part of one who was a party to the foreclosure suit, and was therefore bound to use due diligence in obtaining information of the sale, in order to protect his rights, affords no sufficient reason. *Id.*
3. If a party is equitably entitled to relief against foreclosure proceedings, it is by way of *motion*, addressed to the favor or discretion of the court, to open the biddings at the sale. *Id.*
4. He can claim no legal or absolute right; and if permitted to come in at all, can be allowed to do so only on terms *Id.*
5. Those terms cannot properly be adjusted in an action brought to set aside the sale as unfairly and inequitably conducted. *Id.*

FRANCHISE.

See BRIDGES.

H.**HIGHWAYS.**

See CERTIORARI.

I.**INJUNCTION.**

See DAMAGES.

INSURANCE COMPANIES.

1. The charter of the Atlas Mutual Insurance Company, granted in 1843, adopted a section of the charter of the Atlantic Insurance Company, granted in 1842. *Held*, that these acts, being passed subsequent to the revised statutes, must, so far as they prescribe a rule for the transfer of paper held by the company, differ from that declared by the revised statutes, be deemed to overrule the former law. *Wood v. Wellington*, 218.
2. The charter of the Atlas Mutual Insurance Company, in regard to notes received for premiums in advance, authorized the company to negotiate them for the purpose of paying claims, or otherwise, in the course of its business. *Held*, that a note given for premiums on an open policy of insurance to the makers, and afterwards substituted for notes which had been negotiated by the company to the plaintiffs, for the purpose of paying claims, or otherwise, in the course of its business, must be regarded as a note of the character specified in the charter; and that the transfer thereof to the plaintiffs by the company was lawful, and the title of the plaintiffs indisputable. *Id.*
3. *Held*, also, that if the notes originally negotiated were lawfully transferred to the plaintiffs, the surrender of these notes, and the substitution of others in their place, for the convenience and accommodation of the parties, was not unlawful; it being but an exchange of securities, all of which were of a character which made it proper, under the charter, for the company to negotiate them for the purposes of its ordinary business. *Id.*
4. The note sued on was endorsed as follows: "Pay — for account of the Atlas Mutual Insurance Company. G. H. T., Secretary." It appearing that the object of the endorsement was to pass an absolute title to the plaintiffs, and that this was the usual mode of transfer with this company; and the nature of the transaction showing that the intention of the parties was to pass an absolute and unrestricted title to the paper; *Held*, that the indorsement, though slightly ambiguous on its face, was susceptible of that construction, and fairly indicated either that the secretary indorsed the note for or on account of the company, or that the plaintiffs, on receiving the sum due thereon, were to credit the same to the account of the company, as between the transferee and such company. *Id.*

INSURANCE COMPANIES—*Continued.*

5. *Held*, further, that on such an indorsement the makers could not refuse payment to the holders, whether the name of the payee in the indorsement remained *in blank*, or was filled in with the names of the plaintiffs. *Id.*
6. That it was a transfer of the title to them, only to be defeated on a prosecution of the note, by proof that the plaintiffs were not the real *parties in interest*. *Id.*

INSURANCE (FIRE)

1. When, at the time of applying for insurance, a paper, called in the policy a survey, is filled out by the applicant, and delivered to the agent of the insurer, and the policy expressly refers to such survey, and makes it a part of the policy, any representation contained therein is to be deemed a warranty. *Ripley v. The Aetna Insurance Company*, 136.
2. And if the statements contained in such survey are to be considered promissory, rather than affirmative warranty, yet the rights and duties of the parties are not altered. If the promise has not been kept—the condition precedent performed—the insurer is not bound by the policy. *Id.*
3. Rules for construing policies of insurance. *Id.*
4. A policy of insurance was based on a written survey, in the form of question and answer. To the question whether there was a watchman in the building during the night, the assured answered, "there is a watchman nights." The fire occurred between three and four o'clock in the morning, on Sunday, when no watchman was present. And it appeared that by the custom of the mill no watch was kept from twelve o'clock Saturday night to twelve o'clock Sunday night. *Held*, that the answer, "there is a watchman nights," was to be understood to mean that there was a watchman in the mill every night. *Id.*
5. *Held*, also, that evidence of a custom of factories in the vicinity of the one insured, not to keep a watch from 12 o'clock Saturday night till 12 o'clock Sunday night, should not be permitted to control the language of the survey. *Id.*
6. That the answers to the questions in the survey must be interpreted according to the popular meaning of the language used. *Id.*
7. Parol evidence cannot be received to control, explain or modify a warranty in a policy of insurance. *Id.*
8. Accordingly *held* that evidence to show that the agent of the

INSURANCE (FIRE)—*Continued.*

- insurers was informed that a watchman was not kept in the building insured from twelve o'clock Saturday night till twelve o'clock Sunday night, was improperly received by the judge, and should have been rejected. *Id.*
9. And it being conceded that no watch was kept from twelve o'clock on Saturday night until twelve o'clock on Sunday night, it was *held* that the warranty was broken, and that the effect of the breach was to annul the policy, without regard to the materiality of the warranty, or whether the breach had anything to do in producing the loss. *Id.*
 10. A provision in a policy of insurance that no action shall be brought for the recovery of any claim upon it, unless the same shall be commenced within one year from the happening of the loss or damage, is valid and binding. *Id.*
 11. Such a condition may be waived, however, by the act of the parties. But a waiver, to be operative, must be supported by an agreement founded on a valuable consideration; or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition. *Id.*
 12. Where the insurer on being applied to for the payment of a loss, under a policy containing such a condition, declined paying it, on the ground that actions had been commenced against it by other parties, which were still pending, and declared it would do nothing in reference to such loss while those suits were pending. *Held*, that this did not amount to a waiver of the condition; nor was the defendant estopped from insisting on the condition. *Id.*
 13. A condition, annexed to a policy of insurance, that no suit or action against the insurers, for the recovery of any claim upon the policy, shall be sustainable in any court of law or chancery, unless commenced within six months next after any loss or damage shall have occurred, is valid; and if an action is not commenced within that time it will be barred. *Boach v. The New York & Erie Insurance Company*, 546.

INSURANCE (MARINE).

1. The schooner *Europa*, owned by B., being at Chicago, laden with a cargo of wheat, B. procured the defendant to insure her freight-list at \$1,500, which was about its amount, on a voyage to Buffalo. The vessel and cargo were also insured by other companies, by B. the owner. During the voyage,

INSURANCE (MARINE)—*Continued.*

the vessel went ashore in a storm, at a place where there was no port, and went to pieces, becoming a complete wreck. B. on the same day made abandonment of the different subjects of insurance to the respective underwriters, which were accepted. The insurers of the wheat subsequently saved about three-fourths of the wheat in a damaged condition. *Held*, that B. having abandoned, as to the freight-list, as for a total loss, and the defendant having accepted the same, such acceptance was conclusive upon it, and the company could not object that the loss was not total, nor that for any other reason, it was not a case for abandonment. *The Buffalo City Bank v. The Northwestern Insurance Company*, 251.

2. *Held*, also, that the defendant having accepted the abandonment of the freight-list as for a total loss, the plaintiff was entitled to recover the full amount of the freight, the same as if the voyage had been completed, and not merely to freight *pro rata itineris*. *Id.*

J.

JETTISON.

See CONTRIBUTION.

JUDGE'S CHARGE.

See BREACH OF PROMISE, &c., 5, 7, 8; COMMON CARRIERS, 8, 9; NEGLIGENCE, 3.

JUDGMENT.

1. A judgment, in an action brought by an executor, as such, dismissing the complaint with costs, and adjudging that the defendants recover of the plaintiff a specified sum, for their costs and disbursements, without any direction that the plaintiff shall pay the costs personally, can only be collected from the assets in his hands. It is in law a judgment against him for costs as executor, and is properly rendered as though he was prosecuting in his own right. *Dodge v. Crandall*, 294.

BY CONFESSION.

2. A statement as to the origin of the debt, in a confession of judgment, as follows: "1852, 1st December, money lent by the plaintiff to the defendant to aid in purchasing lot in

JUDGMENT—Continued.

Forty-seventh street, New York, to the amount of \$200. 1853, 1st August, a balance was due to the plaintiff by defendant, on the purchase of Eighth avenue lot, to \$800. 1854, 1st May, money was lent by plaintiff to defendant to aid in purchasing lots on Ninth avenue to \$300. And cash was lent by plaintiff to defendant at different times since above, to \$175—\$1,475, which sum of \$1,475 is now due by the defendant to the plaintiff—the interest on said sums having been paid till the date hercof." *Held*, to be sufficiently minute; unless it was in regard to the last item, which related to cash lent; and that as to that, it could also be supported within the spirit of the decisions. But if not, that the insufficiency of that item could not have the effect of destroying the whole judgment. *Frost v. Koon*, 428.

See AGREEMENT, 2, 3; ESTOPPEL, 2; TRUSTS.

JURISDICTION.

1. The jurisdiction of this court extends only to the examination of the legal conclusions of the judge or referee before whom a cause is tried, from the facts found by him. The court has no power to look into the evidence, or the case at large, for the purpose of reviewing or determining questions of fact. *Bergin v. Wemple*, 319.
2. This court has no power to review a judgment where the judge, after hearing the evidence on, both sides and upon deliberation after the trial is concluded, orders judgment for the defendant, on the ground that the plaintiff has misconceived his remedy and is not entitled to the relief claimed, even if his allegations were all true; but there is no finding of facts by the judge. *Bridger v. Weeks*, 328.
3. The code is explicit that in that class of cases the judge must state his conclusions of fact. *Id.*

L.**LANDLORD AND TENANT.**

1. It is essential to an under-letting of demised premises that it be of a part only of the unexpired term. When the transfer is of the whole of a term, the person taking is an assignee, and not an under-tenant, although there be in form an under-letting. *Bedford v. Terhune*, 453.
2. In the absence of any evidence of the agreement under which

LANDLORD AND TENANT—*Continued.*

parties entered into possession of demised premises, subsequent to the lessees, if it is shown that they occupied during the whole of the unexpired term of the lease, the fair presumption is that they entered for the whole of such unexpired term. And as such an interest is given, not by an under-lease, but by an assignment, the presumption must be that the occupants are in as assignees, and not as under-tenants. *Id.*

3. Where by the terms of a lease it is made a ground of forfeiture of the term if the lessees shall let or under-let without the written consent of the lessor, and parties other than the lessees are in possession without such consent, in the absence of any proof as to the agreement under which they entered, the presumption (if any presumption is to be indulged in), is that the transfer to the occupants was by assignment, and not by under-letting. *Id.*
4. If they are in as under-tenants, they will not be liable to the landlord for the rent, either in an action on the lease, or for use and occupation. *Id.*
5. Where the defendants entered by consent of the lessees, had the lease in their hands, and paid the rent thereon, to the lessor, for the benefit of the lessees, and occupied for the whole residue of the term, and there was no evidence of a holding in any other character: *Held*, that under these circumstances the law would presume they were in as assignees of the lease; and that they were liable as such on the lease, for the rent. *Id.*
6. When the law infers an assignment of a lease from certain facts proved, the inference must be of a valid, operative assignment, such an one as would be sufficient to transfer the term. And it is incumbent upon persons sought to be charged with the rent, as assignees, to prove either that there was no assignment, or that it was one void in law. *Id.*
7. A lessor cannot recover rent upon a complaint for use and occupation, where it appears from the evidence that there was a lease of the premises to other parties, and that the defendants were in as assignees of the term. *Id.*
8. But in such a case, the court may, on the trial, allow an amendment of the complaint so as to conform it to the proof, and permit a recovery for the rent due on the lease, where it does not appear that the defendants have been surprised. *Id.*

LANDLORD AND TENANT—Continued.

9. In an action for use and occupation, a lease from the plaintiff to other parties, which had two years to run from the entry of the defendants, being proved; it was *held* that it was incumbent on the plaintiff to prove it surrendered, so that they were at liberty to re-let the premises; and that if a surrender in law was proved, the defendants were liable for the rent. *Id.*
10. In order to effect a surrender by act or operation of law, there must be a mutual agreement between the lessor and the original lessee, that the lease shall terminate. *Id.*
11. It is not necessary that this agreement should be express. It may be inferred from the conduct of the parties. *Id.*
12. The occupancy by some person other than the lessee is a circumstance showing a surrender; but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term. *Id.*
13. It must be proved that the lessor and lessee mutually agreed to a surrender of the term; and that proved, the original tenant is no longer liable; but the new tenant (if there be one), is liable. *Id.*
14. Where tenants sued for use and occupation by the original lessor, insist that they entered under the lessees, and show the lease in their hands, and prove the payment of rent by them on the original lease for the benefit of the lessees, they are liable as assignees of the term for the rent accruing after their entry. *Id.*

LETTERS.

See **ORDERS FOR THE DELIVERY OF GOODS**, 2, 4, 5; **SLANDER**, 1, 2.

LEX LOCI.

See **USURY**, 5, 6.

LICENSE.

See **WATER**, 8.

LIMITATIONS, STATUTE OF.

See **AGREEMENT**, 1.

LOAN OFFICE MORTGAGES. See **COMMISSIONERS OF LOANS.**

M

MALICIOUS PROSECUTION.

1. Whatever the plaintiff may prove, in an action for malicious prosecution, the defendant is at liberty to disprove. *McKown v. Hunter*, 625.
2. The essential elements of the action are malice and want of probable cause. These it belongs to the plaintiff affirmatively to prove, or to introduce evidence in regard to them from which they may be legitimately inferred. *Id.*
3. The defendant is at liberty to show both the absence of malice and the existence of probable cause; and no evidence pertinent to either issue should be excluded. *Id.*
4. Hence, where the defendant in such an action is examined as a witness, on the trial, he may be allowed to testify that at the time he made a complaint against the plaintiff, for perjury, he believed the evidence given by the plaintiff, on a former trial, was material: and that he, at the time of making such complaint, believed that the plaintiff was guilty of the charge made against him. *Id.*

MILLS.

See WATER.

MISTAKE.

See PAYMENT.

MORTGAGE.

See COMMISSIONERS OF LOANS; FORECLOSURE SUIT.

N.

NEGLECT.

1. The general rule in actions for damages arising from negligence, is that the defendant's negligence makes him liable, unless the plaintiff has done something to contribute to the accident. If he has, then he can not recover. *Haley v. Earle*, 208.
- Although the plaintiff has been guilty of negligence, yet, if his negligence had nothing to do with the occurrence, the defendant has no right to seek on that account to excuse the negligence on his part which caused the injury to the plaintiff. *Id.*

NEGLIGENCE—Continued.

3. Hence, in an action for damages caused by a collision of boats, it is not erroneous for the judge to charge that, although the plaintiff's boat was without a helmsman, that was a matter of no consequence, unless the absence of a helmsman contributed to the injury. *Id.*

See COMMON CARRIERS, 1, 2, 3, 4, 7, 8; PRINCIPAL AND AGENT; RAIL ROAD COMPANIES, 1, 2, 3.

NEW TRIAL.

A new trial will not be granted when it is seen that the facts cannot be changed, and the fact proved is conclusive of the case. *Brown v. Bowen*, 519

See APPEAL.

NEW YORK CENTRAL RAILROAD COMPANY.

See RAILROAD COMPANIES, 4-8.

NOTICE

OF PROTEST. See PROMISSORY NOTES, 1, 2, 3, 4.

NUISANCE.

See BRIDGES, 3, 4, 5, 6; WATER, 8.

O.**OPINIONS OF WITNESSES.**

Opinions of witnesses may be received as to the value of chattels, and a witness who has been in this country five years may be allowed to testify as to the value of the contents of a trunk, from knowledge acquired since he came to this country, and to prove that he has made inquiries here as to the value of articles of that kind. *Merrill v. Grinnell*, 594.

See EVIDENCE, 2.

ORDER FOR THE DELIVERY OF GOODS.

1. Neither the retention of an order for the delivery of property by the drawee, nor the subsequent recognition of it in a letter, or in conversation, nor all of them combined, will prove an acceptance of the order. *Briggs v. Sizer*, 647.
2. Retention of an order may, unexplained, justify an inference of acceptance. *Id.*
3. But where the drawee of an order for carrot seeds wrote a

ORDER FOR THE DELIVERY OF GOODS—*Continued.*

letter to the payees acknowledging the receipt of the order, and saying that he could not then fill the order, but that he would *try* and send a part or the whole of the seed in the course of two or three weeks : *Held*, that the inference arising from the retention of the order was rebutted by the letter. *Id.*

4. *Held*, also, that the letter was not an acceptance of the order, there being no promise to deliver, at any time, any quantity of seed. *Id.*
5. That the letter was to be treated rather as an offer of new conditions, upon which the drawee expressed his willingness to try to deliver all or part of the seed; and that, if it were thus considered, then it was incumbent on the payees to notify the drawee of their acceptance of the proposed terms. *Id.*
6. A recognition, by the drawee, of the *goodness* of an order, is not an acceptance; especially where he declares, at the same time, his inability to deliver the property unless the payee will wait until he can import it. *Id.*
7. Orders for the delivery of personal property do not require any acceptance. They are usually ratified by a delivery of the property on presentation; and hence it is that possession of such an order, unexplained, is evidence that the drawee has paid it. *Id.*
8. The holder of such an order may, however, require an acceptance of the same in writing; and, when he does require it, the drawee is bound so to accept. *Id.*
9. Where the payees did not ask or expect a written acceptance of the order, but sent it forward in the expectation that the property would be at once forwarded, or notice given that it would not be delivered, and the drawee declined to accept, and immediately notified the payees of his determination not to accept unless they would accept the conditions which he proposed, which they failed to do; *held*, that, after this, the retention of the order by the drawee could have no effect on the relation of the parties. *Id.*
10. It is not necessary there should be a consideration moving from the payee to the drawee of an order in order to support an acceptance. In this case, as in all cases of bills of exchange, the consideration for the acceptance moves between the drawer and drawee, and not between holder and acceptor. *Id.*

ORDER FOR THE DELIVERY OF GOODS—Continued.

11. If there is a valid contract between the drawer and drawee, by which each agrees to sell and deliver property to the other, the promise of the one party is a sufficient consideration for the promise of the other, and the drawer can maintain an action for the breach of the contract. *Id.*

P.**PARTIES.**

See **AMENDMENT.**

PARTNERSHIP.

1. The term "dormant partner" implies one who is not an active partner nor generally known as a partner. But to be such it is not essential a person should wholly abstain from any actual participation in the business of the firm, or be *universally* unknown as bearing a connection with it. *North v. Bloss*, 874.
2. Nor does the term necessarily imply a studied *concealment* of the fact. *Id.*
3. Where a firm consisting of three members, B. A. & M., did business under the firm-name of "B. & A.," and everything in the apparent mode of transacting their business indicated that B & A. constituted the sole members of the firm; and there was nothing to signify to ordinary dealers with the firm that M. had anything to do with it; and there was an entire omission on the part of B. & A. to communicate the fact of such connection to one dealing with them; and actual ignorance by him of such connection, and apparent good faith on his part in treating B. & A. as the only parties interested; *held*, that the referee was right in regarding M. as a dormant partner, and therefore not necessary to be joined as a co-defendant with B. & A. *Id.*
4. And the only ground for presuming that there was any *general* knowledge of the fact that M. was interested in the firm being the circumstance of his name appearing upon the cards of the firm, but there was no evidence that those cards were in any way circulated, or issued to a single person; *held*, that it belonged to B. & A. to bring out a fact so vital to their defence of the non-joinder of M. *Id.*

See **DEBTOR AND CREDITOR**, 5 to 9.

PAUPERS.

See WORK AND LABOR.

PAYMENT.

Where, in an action to recover back money paid by mistake, the referee found that the defendants were overpaid—were overpaid by *mistake*, and by mistake on a *matter of fact*; held, that this made the allowance for such over-payment a lawful credit in favor of the plaintiff, and deprived the defendants of the benefit of the objection that the payment was a voluntary one made with full knowledge of the fact; it being neither a voluntary payment, nor made with such a knowledge of the facts as barred the plaintiff's title to relief. *North v. Bloss*, 374.

DEMAND OF. See PROMISSORY NOTES, 4, 5, 6, 7.

PERSONAL PROPERTY.

SALES OF. See VENDOR AND PURCHASER, 3 to 18.

ORDERS FOR DELIVERY OF. See ORDER FOR THE DELIVERY OF GOODS.

PLEADING.

See ANSWER; COMPLAINT

POWER IN TRUST.

See TRUSTS.

PRACTICE

1. If the findings of a referee are imperfect, it is the duty of the party who is not satisfied with them to apply for more specific findings, instead of seeking to avail himself of such defects. In such cases the finding of facts necessary to sustain the judgment will be presumed. *Brainerd v. Dunning*, 211.
2. The supreme court has the undoubted power and right to examine the evidence at large, and upon the whole case, including the law and the facts, to set aside a verdict and grant a new trial. *Macy v. Wheeler*, 231.
3. That court can, from the evidence, reach different conclusions of fact from those found by the jury. In reviewing trials, it has power to pass upon questions of fact as well as law; whilst the court of appeals is confined to the correction of errors of law only. *Id.*
4. Having no power to review any questions of fact determined

PRACTICE—Continued.

- in the subordinate courts, when a new trial is granted the court of appeals is obliged to affirm the order, if it can stand consistently with any view to be taken of the evidence given at the trial, where the trial has been by jury. *Id.*
5. Exceptions to a referee's findings of fact cannot be reviewed in this court. *Thompson v. Kessel*, 883.
 6. Where the testimony before a referee is conflicting upon all the material points involved in the action, and the supreme court, at general term, has affirmed the judgment, the court of appeals cannot look into the testimony, to determine whether the facts are found according to the weight of evidence. *Id.*
 7. If new matter set up in an answer as a defense is sham, or irrelevant, it is the duty of the plaintiff to move, on notice, to strike it out. If the new matter does not, upon its face, constitute a defense, the plaintiff should demur to it. He can not move, at the trial, to strike it out, on the ground that the facts stated do not constitute a valid defense to the action. *Smith v. Countryman*, 655.
 8. A judge has no power to strike out pleadings, on the trial. All objections to the pleadings should be decided before the circuit. *Id.*

See AMENDMENT; JURISDICTION; WITNESS.

PRINCIPAL AND AGENT.

- A joint action will lie against principal and agent, for a personal injury caused by the negligence of the latter (in the absence of the former), in the course of his employment. *Phelps v. Wail*, 78.

PRINCIPAL AND SURETY.

1. The performance of an unqualified legal obligation by the payment of part of the amount due upon a promissory note, is not a valid consideration for the extension of payment of the remainder, so as to discharge sureties. *Halliday v. Hart*, 474.
2. H. being the holder of two promissory notes made by W.—one for \$1,000 and the other for \$500, both of which were overdue—W. proposed to pay \$400 on the \$1,000 note. H. offered to receive the payment on the \$500 note, and in consideration thereof to extend the time for the payment of the other note. To this proposition W. declined to accede, but

PRINCIPAL AND SURETY—*Continued.*

finally, at the instance of H., he agreed to apply \$30 upon the \$500 note, and \$70 upon the \$1,000 note. H. agreed, in consideration thereof, to extend the time for the payment of the \$1,000 note, and thereupon the money was paid and applied as H. proposed; in consideration of which, he executed a written agreement to extend the time for the payment of the \$1,000 note, until the first day of October then next. *Held*, that in making these payments W. only discharged the legal obligations already resting upon him; and that neither the fact of such payments, nor the appropriation thereof, upon the two securities, furnished any consideration for the agreement to give time for the payment of the \$1,000 note. *Id.*

3. *Held*, also, that the referee properly excluded parol evidence, offered for the purpose of showing that the \$70 was paid as interest on the \$1,000 note; such testimony tending to contradict, vary and alter the written agreement. *Id.*
4. *Held*, further, that it was not competent for indorsers, not parties to the written contract between W. and H., to contradict, vary or alter the consideration expressed therein, by parol evidence. *Id.*

PRIVILEGED COMMUNICATIONS.

1. The rule which protects professional communications of clients to their attorneys or counsel, from disclosure, should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or anticipated. Per SELDEN, J. *Whiting v. Barney*, 330.
2. Where both parties are present, at the time when a communication is made by one of them to his attorney or counsel, there is nothing confidential in the communication. *Id.*

See SLANDER, 6, 7.

PROMISSORY NOTES.

1. Where M. H., the endorser of a note, wrote his name in the usual manner, and in good faith, in making the indorsement, using the initial only for his christian name, but it was written in such a manner that a person not acquainted with the endorser's christian name would read it A. C. instead of M., and the notary who protested the note read it A. C. and addressed the notice of protest to A. C. H.; *Held*, that

PROMISSORY NOTES—*Continued.*

the mistake in addressing the notice was directly attributable to the manner and form of the endorser's handwriting in making the indorsement; that the notice sent was a good notice, in law, to the indorser, and that he could not make the mistake which he had thus occasioned available, to shield himself from liability. *The Manufacturers' & Traders' Bank v. Hazard*, 226.

2. And the notice having actually come to the indorser, though after a delay of several days; *Held*, that it was a good notice to charge him, notwithstanding the delay and the erroneous address. *Id.*
3. Reasonable diligence is all that is required in any case; and where a plaintiff acts upon what the defendant appears to have written plainly upon the instrument, that is reasonable diligence, and he is not bound, as between them, to go beyond that, and make inquiries. *Id.*
4. When a promissory note is not made payable at any particular place, generally, in order to charge the indorser, payment must be demanded of the maker, at his place of residence or business. Yet there are various exceptions to this rule. *Adams v. Leland*, 309.
5. If the maker has no known residence or place, the holder will be excused from making any demand whatever. So, if in the intermediate period between the time when the note was made, and when it becomes due, the maker has removed his domicile or place of business to another state, the holder will be excused for non-presentment for payment, and will be entitled to the same recourse against the indorsers as if there had been a due presentment. *Id.*
6. It will, in such a case, be sufficient to present the note at the maker's former residence or place of business. *Id.*
7. Where the makers had, since the making of the note, removed their place of business, unknown to the holder, and on inquiry at the former place of business, the holder was referred to the agent of the makers, who informed him that they were "out west;" *Held*, that this was equivalent to saying they were out of the state; and that due diligence had been used by the holder to ascertain where to demand payment. *Id.*

See EVIDENCE, 1-5; INSURANCE COMPANIES, 2, 3, 4, 5, 6; USURY, 4, 5, 6.

R

RAILROADS.

S. subscribed for \$500 of stock in a railroad company, upon the understanding that the first ten per cent required by law to be paid in cash on subscribing, should be paid by his services in procuring subscriptions and right of way. He subsequently presented an account against the company for services, from which it appeared that at the date of the subscription the company was indebted to him in an amount greater than the cash payment required, in which account he applied and credited fifty dollars for ten per cent upon his subscription, and fifty dollars for the first call made thereon. The account was allowed by the company, and the balance paid to S. *Held*, that this was a sufficient compliance with the statute, in respect to the payment of the first ten per cent, and made the subscription obligatory upon S. *Beach v. Smith*, 115.

RAILROAD COMPANIES.

1. Where the plaintiff, a passenger upon a city railroad car, indicated his wish to alight at the place where the car was then stopping, by requesting the driver to keep on the brake, who replied "yes sir," but instead of suffering the car to remain stationary until the plaintiff should alight, he turned the brake and set the car in motion, thereby precipitating the plaintiff, (who was in the act of alighting,) from the car into the street, thereby causing an injury; *Held* that if the jury believed the evidence they were justified in finding the driver guilty of negligence; and that it was not the province of the court to discredit it, and nonsuit the plaintiff. *Mulhado v. The Brooklyn City Railroad Company*, 370.
2. *Held, also*, that the plaintiff was not chargeable with any fault in that he did not prefer the request to the conductor, to stop the cars, instead of to the driver. *Id.*
3. *Held, further*, that there was no fault in the attempt of the plaintiff to get off the front platform, instead of the rear one; he having got on at the front platform without objection; and it not appearing that any notice was given to passengers that they must not get off at the front platform. *Id.*

RAILROAD COMPANIES—Continued.

4. Under chapter 228 of the laws of 1857, which provides that the New York Central Railroad Company, at every station on its road where a ticket office shall be established, shall keep the same open for the sale of tickets at least one hour prior to the departure of each passenger train from such station, but that they shall not be required to keep such offices open between nine P. M. and five A. M., except at Utica and six other stations on its road; and that if any person shall, at any station where a ticket office is established and open, enter the cars as a passenger without first having purchased a ticket, it shall be lawful for the company to demand and receive from him a sum not exceeding five cents, in addition to the usual rate of fare; the extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket office that is open. *Nellis v. The New York Central Railroad Company*, 505.
5. If the ticket office is not open, no ticket can be procured, and no right exists to demand the extra fare. *Id.*
6. So held where the plaintiff entered the cars of the company, at Utica, as a passenger, at one o'clock A. M., without having first procured a ticket, the ticket office not being then, nor for an hour previous to the departure of the train at one o'clock, open.
7. And held, that the company, having assumed to demand and receive from the plaintiff five cents, in addition to the legal fare, under these circumstances it "asked and received a greater rate of fare than that allowed by law," and was thus brought within the provisions of the first section of chapter 185 of the laws of 1857, and was liable to the penalty of \$50 mentioned in that section. *Id.*
8. Held, also, that in an action against the railroad company, to recover the forfeiture of \$50, it was not necessary that the complaint should set out the various enactments consolidating the several companies which make up the New York Central Railroad Company, so as to show that the latter company is restricted to a fare of two cents per mile for each passenger; but that it was enough to allege that the defendant had been duly organized; that it was entitled to demand and receive of passengers a certain rate of fare, and that it had demanded and received a higher rate. *Id.*

REFEREE. See PRACTICE, 1, 5, 6.

S.

SALES.

See BANKS AND BANKING; VENDOR AND PURCHASER.

SET-OFF.

See USURY, 1, 4.

SHERIFF.

See ARREST, 4, 6, 7, 8; ESCAPE; EXECUTION, 1, 3, 4.

SHIPS AND SHIPPING.

1. The master of a vessel is, for most purposes, the agent of the owner of the ship or cargo; but that agency does not extend to a sale of either, unless there is a necessity at the time for so doing. *Buller v. Murray*, 88.
2. As to the *degree* of the necessity which must be shown to have existed, in order to justify a sale of the ship or cargo. *Id.*
3. In order to justify the sale of a cargo at an intermediate port, several things must concur : 1. There must be a necessity for it arising from the nature or condition of the property, or from an inability to complete the voyage by the same ship, or to procure another. 2. The captain must have acted in good faith. 3. He must, if practicable, consult with the owner before selling. *Id.*
4. Where there is a question for the jury, on the facts as to the necessity for a sale of the cargo, the court should submit the case to the jury, instead of ordering a verdict for the plaintiff. *Id.*
5. And if the jury should believe from the testimony, that judging from the condition of the cargo at the port where sold, it would, if re-shipped by any vessel and sent to its port of destination within a reasonable time, be so damaged as to be practically valueless, the master in an action against him to recover the value will be entitled to a verdict. *Id.*
6. And where the master of a vessel, conveying a cargo of hides, found the cargo at an intermediate port to be in a bad and perishing condition, and summoned three respectable men, dealers in, and shippers of hides, to examine the cargo, and declare what it was proper for him to do, under the circumstances, who advised a sale, and the hides were sold accordingly. *Held*, that although this advice was not conclusive,

SHIPS AND SHIPPING—*Continued.*

- yet that it should be taken into consideration by the jury in determining the question as to the necessity of a sale, and was entitled to very considerable weight. *Yd.*
7. The legal and record title does not, of itself, decide the question of liability for supplies furnished to a registered vessel. The question is, to whom was the credit given; and the law adjudges it to have been given to the person in actual possession of the vessel, who controls her operations, receives her freight and earnings, and directs her destination. *Macy v. Wheeler*, 231.
 8. The defendant was the registered owner of a vessel, but he held the title merely as trustee for P., the real owner; and had no interest in her earnings, which belonged to P. or the persons to whom he transferred them. The plaintiff furnished a set of sails for the vessel, upon the order of P. *Held*, that a verdict for the plaintiff could only be warranted by a finding, 1. That the contract was not made with, and the credit given to P. exclusively; 2. That the defendant was in actual possession of the vessel, controlling her movements and interested in her voyage, and directing what should be done with her, in all respects as her owner, when the sails were furnished; or that he expressly authorized P. to contract for the same on his responsibility. *Id.*

SLANDER.

1. In an action for slander, the plaintiff, to show special damage, may give in evidence the contents of a letter written by the person to whom the slander was uttered, to his partner, advising him to discharge the plaintiff from their employ, and stating the substance of the writer's conversation with the defendant, although the letter did not cause the discharge of the plaintiff, but only an examination of his trunks. *Fowles v. Bowen*, 20.
2. In an action for slander, a previous letter written by a partner of the defendant, and with his assent, concerning the plaintiff, is admissible in evidence to show malice. *Id.*
3. Words spoken of the plaintiff, while in the employ of the defendant's firm as a clerk, and addressed to a subsequent employer, to the effect that the plaintiff had become such a notorious liar that they could place little or no confidence in him; that they were so strongly impressed with his dishonesty that they had written to a person named to employ

SLANDER—Continued.

- a police force to watch him, &c., must be understood as relating to him in his capacity of clerk ; and being spoken of him in connection with his business, they are actionable *per se. Id.*
4. Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. *Id.*
 5. After a mercantile firm has given to one of its clerks a general recommendation as such, if a partner is led by facts subsequently coming to his knowledge, to change his opinion, it is his right and duty to communicate the facts to a subsequent employer of the clerk, in order to guard him against being misled by the previous recommendation of the firm. *Id.*
 6. Such a communication, if true, is privileged ; and in order to sustain an action thereon for slander, the plaintiff must show it to have been malicious. *Id.*
 7. In the case of privileged communications, slight evidence of malice may be left to the jury. *Id.*
 8. Evidence of the falsity of the charge is not sufficient to authorize the inference of malice. *Id.*
 9. The plaintiff, if he seeks to maintain his action, must show that the charge was false, before he can ask the jury to find the slander to be malicious. *Id.*

STOCK.

See **BANKS AND BANKING; RAILROADS.**

STREAMS.

Where the bed of a stream belongs to the state, no person has the right to use the same without its consent ; but so long as the state officers make no objection to such appropriation, no individual or corporation has a right to complain of it. *The Fort Plain Bridge Company v. Smith, 44.*

See **BRIDGES, 3, 4, 5, 6, 7; WATER.**

SUPREME COURT.

See **PRACTICE, 2, 3.**

SURPLUS MONIES.

1. Where a judgment creditor of a mortgagor releases from the operation of his judgment, certain premises which are

SURPLUS MONEYS—Continued.

bound thereby, this should not prejudice him (or his assignee) in a contest respecting the surplus moneys arising from a sale of mortgaged premises in a foreclosure suit, beyond the proportionate part of the judgment which the released premises, in connection with the mortgagor's other real estate, ought to pay. *Frost v. Koon*, 428.

2. Where a purchaser claims surplus moneys in a foreclosure suit on the ground that a prior judgment upon which the mortgaged premises were sold, was not a valid lien upon the lands, and it appears that he did not interfere to prevent the sale by injunction, or the consummation of the title by deed, or the delivery of possession thereunder to the purchaser at the sale under the judgment, he will be held to have been guilty of so much *laches* in the assertion of his rights, that he ought not to be permitted to enforce them against such surplus moneys. *Id.*

See ESTOPPEL. 2. 3.

SURRENDER.

See LANDLORD AND TENANT, 9, 10, 11, 12, 13.

T.**TRAVELING EXPENSES.**

See COMMON CARRIERS.

TRUSTS.

In November, 1834, S., having previously acquired the title to certain lands at D. for the benefit of himself and others, conveyed one moiety thereof to N. On the same day an agreement was entered into between S. and N., by which they agreed each with the other to convey one undivided fourth part of said lands to the N. Y. & E. Railroad Company, on condition that said company should, within seven years, construct a single track of their road to D. But that if said company should fail to perform that condition, they would divide the said one-fourth part of the land between themselves. On the 8th of January, 1838, the several persons interested in the lands, including the railroad company, agreed on a plan for dividing the same amongst themselves; in pursuance of which all the parties interested conveyed,

TRUSTS—*Continued.*

by deeds absolute on their face, their interests in the land, including the railroad company's shares, to N., who was to convey to such parties the portions of the land to which they were respectively entitled, except that the share of the railroad company was to be conveyed to N. and K. in trust to convey the same to the company on the performance of the condition aforesaid; but if the company should fail to perform that condition, then the trustees were to divide the lands, or their proceeds, amongst the persons interested therein. N. thereupon conveyed the portion of the lands intended for the railroad company to T., who conveyed the same to N. and K. and the latter gave back to the railroad company a declaration of trust, setting forth the terms and conditions on which they held the land, and a like declaration setting forth the terms and conditions on which they were to convey the same, or divide the proceeds amongst the parties interested therein. All these conveyances were executed and delivered on the 1st and 2d of March, 1838. The railroad company failed to perform the condition upon which the land was to be conveyed to it. On the 26th of October, 1838, a judgment was docketed against S. in favor of G., on which the land forming the railroad company's share was sold by the sheriff, and was redeemed by the plaintiffs as assignees of a junior judgment, who received a deed from the sheriff. In 1850 N. and K. sold the shares of the railroad company, and the proceeds of ten parts thereof, belonging to S. under the declaration, amounted to \$11,226.83, which was the fund in controversy. The defendant claimed the same under a subsequent judgment against S. and a creditor's bill founded thereon. *Held*, 1. That a valid trust was not created by all or any of the conveyances executed by the parties, in respect to the share of the lands intended for the railroad company, the trust attempted to be created not being for either of the purposes for which alone express trusts are permitted. 2. That although the trust was void, there was a valid power in trust vested in N. and K. by the conveyance of March 1, 1838. 3. That there being no legal interest in S. on the 26th of October, 1838, on which the judgment of G. could be a lien, the title of the plaintiffs to relief must fail. 4. That the arrangement between the parties interested in the land prior to March 1, 1838, created no trust. That their rights and liabilities

TRUSTS—Continued.

rested in covenant, whereby each owner agreed to give a portion of his land to the railroad company, and that the title did not pass charged with any such obligation, except so far as either party had the right in equity to compel a specific performance. 5. That S. did not, as the beneficiary of the power in trust, become, by virtue of section forty-seven of the statute of uses and trusts, vested with a legal estate in the land, upon the failure of the trust estate to vest in N. and K. 6. That it was not until the declaration of trust in behalf of the respective owners took effect that S. was clothed with any interest whatever in the lands, or their proceeds. That the interest he then acquired was an equitable title to enforce the execution of the power and the sale of the lands for an account and distribution of the proceeds. *New York Dry Dock Company v. Stillman*, 174.

U.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 4, 7, 9.

USURY.

1. After an account containing, among other items, a charge of the sum paid to take up a note made by the debtor has been rendered to the debtor, and its correctness conceded by him, and the account has become a stated account, neither the debtor nor his assignee can assail the note for usury, when the same is brought forward as a set-off by the party rendering the account. *Bullard v. Raynor*, 197.
2. If one permits an account into which a usurious item enters to become stated, and then assigns to a third person his demands against the party rendering the account, the assignee will take the claim subject to the right of the party rendering the account to rest upon the same as a stated account. *Id.*
3. Usury is a defence personal to the party known as the borrower. He cannot transfer to another the right he has to allege and prove a demand to be usurious. *Id.*
4. The maker of a promissory note, tainted with usury, may by bill in equity, assert the usury and defeat the note as a set-off, notwithstanding an account between him and the holders thereof, embracing such note, has been rendered, and

USURY—*Continued.*

- has become a stated account. But while it stands a stated account as between him and the holders of the note, the assignee of the maker is concluded by it, and cannot assail the note for usury when it is claimed as a set-off. *Id.*
5. Where a promissory note, made and dated in this state, and payable at a bank here, is negotiated in another state, the laws of New York are to control as to the defense of usury. *Jewell v. Wright*, 259.
6. And if the note is discounted at a rate of interest exceeding seven per cent, no action can be maintained upon it here. *Id.*

V.

VENDOR AND PURCHASER.

OF LAND.

1. Where a grantor covenants in his deed that he is the lawful owner of the premises conveyed, and that the same are free from all legal claims and incumbrances, it is no defense to an action to foreclose a mortgage given for the purchase money, that the premises were at the time subject to the lien of a loan office mortgage, where there has been no eviction of the purchaser, or disturbance of his possession. *York v. Allen*, 194.
2. If there is any breach of the covenant against incumbrances, the purchaser has his remedy by action. He cannot voluntarily yield up the premises to one having no title thereto, and then ask that his equity of redemption shall not be foreclosed, or he be made personally to respond for any deficiency. *Id.*

OF CHATTELS.

3. The plaintiffs agreed to sell and deliver to the defendants a quantity of soft English lead, of the "Walker, Parker & Walker brand," to arrive by the Providence from Newcastle. The lead arrived at New York on the 6th of July, 1853. On that day the plaintiffs notified the defendants of its arrival, and requested them to receive and remove it. The defendants objected to the lead, and declined to consider it theirs, or at their risk. On the 7th, the plaintiffs again notified the defendants that lead was discharging from the vessel, which they claimed to be such as the contract of sale called for, and offered it to the defendants, who declined to receive

VENDOR AND PURCHASER—*Continued.*

or pay for the lead, or to have anything to do with it. *Held*, that this was a sufficient offer of performance and tender of the lead by the plaintiffs; and that they were not required to make or attempt a manual delivery of the whole quantity of lead, or of any part of it. *Pollen v. LeRoy*, 549.

4. And the plaintiffs having, upon the refusal of the defendants to receive and pay for the lead, given them notice that they (the plaintiffs), should sell the lead for their account, and hold them responsible for any deficiency on the re-sale, and for the expenses of keeping and re-selling the article; *held*, that assuming that the lead offered was of a character to satisfy the contract, the plaintiffs were authorized to sell the same, in the ordinary way of selling metals by a broker, for the highest market price, without notice to the defendants of the time and place of sale. And that having so sold the property, they might recover of the defendants the difference between the contract price and the proceeds of the sale, together with all expenses necessarily incurred. *Id.*
5. *Held*, also, that in an action brought for that purpose, evidence of the re-sale of the property, and of the resulting loss, together with the expenses, was properly admitted; and that in the absence of any other evidence upon that subject, the jury were properly instructed to make that the measure of damages if they should find for the plaintiff. *Id.*
6. The difference between the agreed price of an article and its market value at the time of delivery, is the actual damage sustained by a vendor upon a refusal by the vendee to accept the property sold, and the vendor may ascertain or liquidate this amount by a re-sale; taking all proper measures to secure as fair and favorable a sale as possible. *Id.*
7. Although the law regards the vendor, if in possession of the goods, as the agent *quoad hoc* of the vendee in such a case, yet it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold or exposed for sale. *Id.*
8. The ordinary usage of the trade being to effect sales of pig lead through the negotiation of brokers, a vendor is bound to adopt that method, upon re-selling the goods because of the refusal of the vendee to accept them. *Id.*
9. Where an ambiguity exists in a bought and sold note, from its describing an article which does not exist, evidence by an expert to show how the article mentioned therein is

VENDOR AND PURCHASER—*Continued.*

ordinarily spoken of, in trade and conversation, is competent in explanation of the ambiguity. *Id.*

10. Where a sale was concluded by a bought and sold note in writing, containing all the elements of a contract, the names of the parties, price, description of the article, time of delivery and time of payment; *Held*, that it was not competent to vary this by asking a witness "what conversation passed on the subject of this sale, prior to the actual delivery to the respective parties of the sale note." That the question was too broad, and the answer would have introduced matter, both irrelevant to the issue, and improper in itself. *Id.*
11. The plaintiffs agreed, through a broker, to sell and deliver to the defendants "150 tons of soft English lead of W., P. & W. brand," to arrive by a specified vessel. The defendants, on the arrival of the lead, refused to receive it, on the ground that it was not the brand called for by the bought and sold note. There being some evidence tending to prove that lead of the brand "W., P. & W." had been seen in the New York market; *Held*, that this rendered it proper to submit to the jury the question whether such a brand was in existence, so as to enable the plaintiffs to comply literally with the contract. *Id.*
12. And the jury having by their verdict determined that no such article existed in the trade, as the contract between the parties described, and that there was no firm of W., P. & W. in existence; *Held*, that the lead on board the vessel having been manufactured by a firm, two of whose members were named W., and one P., known as "W., P., & Co.," and being the only firm composed of individuals of those names, engaged in the business, and such lead being branded by them, W., P. & Co., the contract was satisfied by a delivery of that lead. *Id.*
13. Where a contract for the sale of lead, required that it should be "soft English lead"; *held*, that it was not erroneous to leave it to the jury to say whether by "soft English lead" was known in commerce soft lead made in England, no matter from what ores. *Id.*
14. An executory contract for the sale of personal property, entered into upon false and fraudulent representations made by the purchaser to induce the vendor to make the same, and upon the truth of which representations the latter relied, cannot be enforced. Whatever facts would enable a party

VENDOR AND PURCHASER—*Continued.*

- to avoid a contract are equally available to enable him to defeat one sought to be enforced against him. *Smith v. Countryman*, 655.
15. Upon a negotiation between C. and W. for the sale by C. of his crop of hops, W., to induce C. to sell him the hops, represented that he had purchased E.'s hops for the price of twelve and one-half cents per pound. C. was ignorant of the price of hops, and was reluctant to sell; but relying upon this representation of W., and believing the same to be true, and having confidence in the prudence and judgment of E., he entered into an agreement with W. to sell him his hops for twelve and one-half cents per pound. The statement as to the purchase of E.'s hops by W. being untrue; *held*, that C. was at liberty to refuse to fulfill the contract, on discovering the fraud, and that the law would not subject him to damages for the breach. *Id.*
 16. *Held*, also, that in an action against C. for a breach of his agreement to deliver the hops, evidence of his *belief* in the representations made by W., as to his having purchased E.'s hops, and that he entered into the contract relying on that representation, was properly received, and that the court did not err in refusing to strike out such evidence as being immaterial and constituting no defense. *Id.*
 17. Any representation that affects the price of an article, in regard to which one party places confidence in the other, will, if relied on, and is false, and the party trusting to the representation is injured, render the contract void. Per MULLIN, J. *Id.*
 18. A vendor of property may put upon the purchaser the responsibility of informing him correctly as to the market value, or any other fact known to him, affecting the market price of the property, and if the purchaser answers untruly the purchase will be void, by reason of the fraud. The purchaser is not bound to answer, in such a case; but if he does, he is bound to speak the truth. Per MULLIN, J. *Id.*
See BANKS AND BANKING; ORDER FOR DELIVERY OF GOODS.

VESSEL.

See SHIPS AND SHIPPING.

W:

WAIVER.

See INSURANCE (FIRE), 10, 11.

WARRANTY.

See INSURANCE (FIRE), 1, 2, 6, 7, 8.

WATER.

1. Where persons are in the actual use and occupation of premises on which mills are located, and they and those under whom they claim have been in possession thereof for a number of years, and an adjoining proprietor erects a dam below such mills, upon the same stream, by means of which the water is set back upon the wheels in such mills, thereby reducing the power thereof and injuring the mills, an action will lie for damages by the mill-owners. *Brown v. Bowen*, 519.
2. In case of adjoining proprietors of land over which a stream flows, each has the right to use the waters of the stream on his own premises, for any purpose for which it may be legitimately used; and neither has the right by any erection on his own premises to interfere with the enjoyment of the water by the other. *Id.*
3. The only exception to this rule is, that where both parties draw water from the same dam, each has the right to continue to use the water, whatever the effect may be on the other; unless such other has acquired by grant or prescription the right to an exclusive use, or to use whenever there is not enough water for both. *Id.*
4. The occupant of premises injured by the setting back of water upon the land may recover damages against the wrong doer, to an amount sufficient to indemnify him for the injury to such interest as he had in the premises. *Id.*
5. An action will also lie by the reversioner for the injury done to the inheritance. *Id.*
6. Where the plaintiffs, in an action for such an injury, allege in their complaint that they are joint owners of the property, they are bound to prove it. *Id.*
7. Where the defendants, in such an action, occupied premises adjoining those in the possession of the plaintiffs, and never made claim to the latter; *Held*, that the law would presume the plaintiffs were lawfully in possession, and entitled to recover damages for the injury sustained by them. *Id.*
8. Where the plaintiffs consented to the building of a dam by the defendants, on the condition that the work should be so done as not to injure the plaintiffs, but the work was so imperfectly executed that the current of the stream was

WATER—Continued.

impeded, and the water did not flow off, but set back upon the plaintiffs' wheels; *Held* that the condition on which the consent was given not having been performed, the consent or license was no longer binding on the plaintiffs, and the dam from that time became a nuisance, and the defendants liable for the injury it caused the plaintiffs. *Id.*

9. *Held*, also, that the consent of the plaintiffs, and rendering aid in the work, could only operate against them by way of estoppel; and that it could not thus operate, because of the express condition on which such aid and assent were given. *Id.*

See COMMON CARRIERS, 3; ESTOPPEL, 4, 9.

WILL.

See DEVISE.

WITNESS.

1. A party who cross-examines a witness as to a collateral matter, is concluded by his answers. He can not draw out collateral statements from the witness, and for the purpose of discrediting him, show that on some other occasion he stated differently. *Carpenter v. Ward*, 243.
2. To entitle the examining counsel to show the discrepancy, for the purpose of impeaching the credibility of the witness, it must either appear that the testimony related to a point *material* to the issue on trial, or to a fact brought out on the examination of the adverse counsel. *Id.*

WORK AND LABOR.

1. For work, labor and services rendered to the keeper of a county poor house, by an inmate thereof and his wife, for the benefit of such keeper and in his business, and upon his promise to pay therefor, he is liable. *Bergin v. Wemple*, 319.
2. The keeper of a county poor house is not entitled, any more than a stranger, to the labor and services of the paupers therein, for his own advantage, without compensation; and any contract or promise he may make to pay for such labor will be obligatory upon him. *Id.*

See CORPORATION.

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